(1) Supreme Court, U.S.
FILED

99 1824 MAY 15 2000

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

TELEFONOS DE MEXICO, S.A. DE C.V.,

PETITIONER,

v.

ACCESS TELECOM, INC.,

RESPONDENT.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sherman Act applies extraterritorially to a complaint by a U.S. business about a foreign national's conduct in its home country, when the challenged conduct affected only that country's consumers and the plaintiff's attempt to offer services in that country in competition with the defendant (then a regulated monopoly provider of telecommunications services) implicated core aspects of the foreign sovereign's telecommunications policies.

2. Whether a federal court may assert specific personal jurisdiction over a nonresident defendant based solely on the allegation that the defendant's conduct outside the forum state had foreseeable adverse financial effects on a resident of the forum state.

3. Whether a federal court should weigh international comity concerns and consider the special hardship imposed on the defendant when asked to assert personal jurisdiction over a nonresident foreign national.

PARTIES TO THE PROCEEDING

The petitioner is Telefonos de Mexico, S.A. de C.V. The respondent is Access Telecom, Inc. The other defendants below are MCI Telecommunications Corporation, MCI International, Inc., SBC Communications Inc., SBC International, Inc., and SBC International Latin America, Inc.

CORPORATE DISCLOSURE

Telefonos de Mexico, S.A. de C.V. is a publicly traded company that has issued shares to the public. Carso Global Telecom, a Mexican investment company, holds approximately 26% of the capital stock of Telefonos de Mexico. Carso Global Telecom is affiliated with the Mexican investment companies Grupo Carso and Grupo Financiero Inbursa. The ADRs of each of Carso Global Telecom, Grupo Carso and Grupo Financiero Inbursa are traded electronically through SEAQ and PORTAL in the United States and are publicly traded in Mexico.

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Telefonos de Mexico, S.A. de C.V. ("Telmex") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The order of the court of appeals denying the petitions for rehearing and petitions for rehearing *en banc* (Pet. App. 1a) is unreported. The opinion of the court of appeals (*id.* at 2a-40a) is reported at 197 F.3d 694. The opinion of the district court granting the motion of MCI Telecommunications Corporation and MCI International, Inc. for summary judgment (*id.* at 41a-72a) is unreported. The opinion of the district court granting the motion of SBC Communications Inc., SBC International, Inc., and SBC International Latin America, Inc. for summary judgment (*id.* at 73a-91a) is unreported. The opinion of the district court denying the motion of Access Telecom, Inc. for partial summary judgment (*id.* at 92a-107a) is unreported. The opinion of the district court granting Telmex's motion to dismiss (*id.* at 108a-143a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1999. Petitions for rehearing and rehearing *en banc* were denied on February 15, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case poses the question whether a United States court should decide, under the auspices of the Sherman Act, what competition is appropriate in the market for long distance telephone service in Mexico.

Rejecting core principles of international comity and due process, the Fifth Circuit held that U.S. antitrust laws apply to the conduct of a Mexican telephone company in Mexico concerning the provision of long distance telephone service in Mexico to Mexican customers because the challenged conduct allegedly harmed a U.S. company that was offering a competing service to Mexican subscribers. The Fifth Circuit also held that a district court in San Antonio had specific personal jurisdiction over the Mexican telephone company based on its conduct in Mexico because the allegedly injured competitor was domiciled in Texas. The effect of these decisions was to apply U.S. antitrust law, at the behest of a single U.S. business, to alleged anticompetitive conduct by a Mexican telephone company in Mexico, frustrating a foreign sovereign's telecommunications policies and arrogating to the courts the Executive Branch's role in determining and enforcing our Nation's trade policies.

The Fifth Circuit's application of the Sherman Act to a Mexican national in a case involving no harm to U.S. consumers ignores this Court's teaching in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986), that "American antitrust laws do not regulate the competitive conditions of other nations' economies," raises squarely questions regarding the extraterritorial reach of the Sherman Act which this Court left open in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), and conflicts with the care for international comity concerns taken by other courts of appeals. The Fifth Circuit's approach to specific personal jurisdiction in this case also conflicts with decisions of numerous other courts of appeals. For the reasons explained below, we respectfully submit that this case merits this Court's plenary review.

A. Background

This case involves the Mexican Government's implementation of its policies for introducing telecommunications competition in Mexico. Until 1990, Telmex was the state-owned monopoly provider of telecommunications services in Mexico. *In re Telmex/Sprint Communications, L.L.C., Application for Authority under Section 214 of the Communications Act for Global Authority to Operate as an International Switched Resale Carrier*

Between the United States and International Points, Including Mexico, 12 F.C.C.R. 17,551, at ¶ 14 (1997). In 1990, in order to foster the Mexican Government's stated goals of infrastructure development and network modernization, Mexico privatized Telmex. *Id.* In December 1990, in conjunction with that privatization, the Mexican Government granted Telmex an amended concession to operate a public switched local and long distance telephone network throughout Mexico. *Id.*

The amended concession gave Telmex the exclusive right to provide domestic and international long distance services until August 1996, when long distance competition would commence in Mexico, and required Telmex to interconnect with other long distance competitors beginning January 1, 1997. *Id.*; Pet. App. 101a-102a. The Mexican government awarded Telmex that exclusive concession so that, during this six-year period, Telmex could modernize its network, improve service and prepare for the introduction of competition. Indeed, the concession expressly required Telmex to expand its infrastructure and undertake substantial service commitments during this limited period.

Telmex's concession allowed it to enter into agreements to resell its excess capacity to entities holding concessions or permits from Mexico's Secretary of Communications and Transportation ("SCT"), the Mexican Ministry charged with regulating telecommunications. *Id.* at 3a-4a, 101a-102a. But Telmex entered into no such agreements during the period at issue, and the SCT granted no authorizations to resellers during that time. *Id.* at 95a-96a. Thus, under Mexican law, Telmex was the *only* company that Mexican callers could use to call the United States. *Id.* at 3a.

Telmex's lines reach only to Mexico's border with the United States. Pet. App. 3a. At the border, Telmex's lines interconnect with the lines of U.S.-authorized carriers with which Telmex has bilateral interconnection agreements, such as MCI International, Inc. ("MCI"). *Id.* Telmex collects its tariffed rates from Mexican callers for calls originating in Mexico and terminating in the United States, and U.S. carriers collect their tariffed rates from U.S. callers for calls originating in the U.S. and terminating in Mexico. In addition, pursuant to the interconnection agreements, Telmex and its U.S. correspondents pay one another "settlement payments" for terminating calls originating in the other's country.

In furtherance of their interconnection agreements, international carriers enter into additional bilateral agreements to cover specific services. Telmex thus entered into an international 800 service agreement with MCI, under which callers in Mexico could call the 800 numbers of MCI's customers in the United States on a toll free basis. *Id.* at 3a-4a. As with domestically dialed toll free service in the United States, MCI would charge the called party that subscribed to its 800 service for completed international calls. *Id.* at 8a-9a. MCI would then pay Telmex a settlement payment for transporting the Mexican portion of the calls. *See id.* at 3a.

Historically, Telmex has charged its Mexican customers more for calls dialed directly from Mexico to the United States than its U.S. correspondents have charged their U.S. 800-number subscribers for receiving calls from Mexico. Pet. App. 3a. Access Telecom, Inc. ("ATI"), a company incorporated in Texas, is one of several U.S.-based companies that engaged in arbitrage to take advantage of this price differential. Although ATI had no agreement with Telmex to resell Telmex's capacity and had no concession or permit from the SCT to do so, *id.* at 3a – indeed, the SCT *rejected* ATI's application, *id.* at 18a n.3 – ATI offered a service in Mexico that enabled Mexican customers to call the United States without paying Telmex its tariffed rates for the international call. *Id.* at 2a-3a.

To use its service, ATI instructed its Mexican customers to make an international toll free call to a U.S. 800 number for which ATI had contracted with MCI. Pet. App. 2a-3a. When ATI answered, it provided the Mexican caller a second dial tone and asked the customer to enter his desired U.S. telephone number. *Id.* ATI then connected the caller to that U.S. number using switches located in Texas and New York. *Id.* For this service, ATI charged its Mexican customers less than Telmex's tariffed international rates for calls to the same U.S. destinations. *Id.* By ATI's own account, ATI's service deprived Telmex of $3 million of international long distance revenues. *Id.* at 5a.

In 1993, the Mexican Government began to take affirmative steps to prevent competitors from unlawfully bypassing Telmex's government-granted long distance exclusivity. By letter dated October 4, 1993, Jose Rivas Moncayo, the then-General Director of the SCT's Office of Communications Policies and Standards, advised MCI that the SCT had become aware that companies were offering services in Mexico to make international long distance calls using 800 numbers and receiving a call back from the United States with a U.S. dial tone, enabling Mexican callers to bypass Telmex. Pet. App. 4a. The letter stated that this practice was illegal and requested that such services be suspended.[1]

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[1] Contrary to the Fifth Circuit's view, Pet. App. 4a, 28a, there is no reason here to distinguish ATI's services from call-back services. Indeed, the FCC expressly considers to be call-back services those services, such as ATI's, that use international 800 numbers to bypass a foreign carrier's phone lines. *In re Via USA, Ltd. and Telegroup, Inc.*, 9 F.C.C.R. 2288, 2288 n.5 (1994), *on reconsideration*, 10 FCC Rcd 9540 (1995). Call-back services cannot be distinguished from ATI's service on the ground that "ATI's service . . . paid Telmex exactly what Telmex had contracted with MCI to receive" (*i.e.*, the settlement payment). Pet. App. 4a. With call-back service, a caller in Mexico would dial the telephone number of a call-back provider in the United States. Instead of answering the call, the call-back provider would electronically note the caller's telephone number and call the Mexican caller back, giving him a U.S. dial tone with which to make his international call. The return call from the U.S. to Mexico would generate a settlement payment to Telmex. *In re Via USA*, 9 F.C.C.R. at 2288 & n.5. Thus, under either type of service, the only revenue that Telmex received was a settlement payment. In an "Official Circular" dated June 12, 1996, after the events

On April 19, 1994, and in later correspondence, Telmex notified MCI that it would disconnect international 800 numbers that were being used to complete telephone calls from Mexico to the United States. Pet. App. 4a. On July 21, 1994, Telmex began to disconnect those of MCI's international 800 numbers that Telmex found were being used for unlawful bypass. *Id.* Shortly after October 19, 1994, Telmex completed its disconnection of all of ATI's international 800 numbers. *Id.* at 5a. ATI subsequently attempted to obtain 800 numbers from AT&T Corp. ("AT&T"), but its business soon folded. *Id.*

B. Proceedings Below

ATI brought this action in July 1995 in Texas state court against Telmex, MCI Telecommunications Corp. and MCI International, Inc. (collectively, the "MCI defendants"), and SBC Communications Inc., SBC International, Inc. and SBC International Latin America, Inc. (collectively, the "SBC defendants").[2] ATI claimed breach of contract, tortious interference with contract, negligent misrepresentation, and promissory estoppel, and raised federal and state antitrust claims that the parties and the courts below construed as claims under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and their state law counterparts. Pet. App. at 109a-117a. The case was removed to the United States District Court for the Western District of Texas. Pet. App. 110a.

On June 23, 1997, the district court granted Telmex's motion to dismiss the claims against it for lack of personal

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at issue here, the SCT reiterated that all alternative call procedures to bypass Telmex's statutory monopoly were illegal and ordered them to cease. Pet. App. 4a, 28a.

[2] SBC International, Inc. held approximately ten percent of Telmex's capital stock at the time and had detailed employees to work with Telmex in Mexico. ATI claims that the MCI and SBC defendants identified ATI's 800 numbers for Telmex, which then disconnected the numbers, and that, together with Telmex, they interfered with ATI's contract with AT&T. Pet. App. 5a.

jurisdiction. Initially, the court held that ATI could not establish nationwide personal jurisdiction over Telmex under the Clayton Act, 15 U.S.C. § 22, because its claims failed to establish subject matter jurisdiction under the antitrust laws. Pet. App. 110a-117a. Starting from the premise that "the antitrust laws of the United States do not regulate the competitive conditions of other nations' economies," *id.* at 116a, the court concluded that, "[i]n view of the fact that the conduct of Telmex all occurred in Mexico, that the market from which ATI claims to have been excluded is the I-800 service market in Mexico, and that the resultant economic consequences are felt predominately *[sic]* by Mexican consumers," the court did not have subject matter jurisdiction over ATI's antitrust claims against Telmex. *Id.* at 117a.

The court addressed, next, whether ATI had alleged a proper basis for personal jurisdiction over Telmex in Texas. Relying in part on Mr. Rivas Moncayo's uncontroverted deposition testimony that he had officially advised ATI that its unlicensed operations violated Mexican law, Pet. App. at 123a-127a, the court found that "Mexican law d[id] not allow ATI to repurchase the I-800 service from MCI or anyone else without first obtaining Telmex's permission to do so and that ATI never obtained such authorization from Telmex." *Id.* at 128a. The court held, accordingly, that by terminating ATI's service, Telmex did not purposely engage in a course of tortious conduct sufficient to render it amendable to an assertion of specific personal jurisdiction. *Id.* The court found further that Telmex's ownership structure, investments and telecommunications agreements with companies in Texas were not sufficiently "systematic and continuous" to "render it amenable to the general personal jurisdiction of a Texas court." *Id.* at 134a.

On August 5, 1998, the district court denied ATI's motion for partial summary judgment on the lawfulness of its activities in Mexico. The court concluded that, regardless of "what appellation properly identifies ATI's service, . . . no matter how ATI tries to fashion it, the service that it provided was a form of long distance service and the people it provided that service to were residents of Mexico." Pet. App. at 104a (footnote omitted). Observing that ATI had been "providing a long distance service to residents of Mexico at a time when Mexican regulatory law required it to have a permit or concession from the SCT to do so," the court held that "the failure of ATI to obtain such a permit or concession from the SCT for its long distance service rendered its operation unlawful under Mexican law." *Id.*

In two additional orders entered that same day, the district court granted summary judgment for the MCI and SBC defendants. With regard to ATI's antitrust claims, the court explained that the Sherman Act "applies to foreign anti-trust conduct only to the extent that said conduct produces 'some substantial effect in the United States,'" and concluded that the activities at issue, which occurred outside the United States, had no such effect. Pet. App. 68a, 78a (quoting *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993)).[3]

The Fifth Circuit reversed. Pet. App. 2a-40a. Applying Texas choice of law principles, the court of appeals first held that Texas (not Mexican) law applied to determine the validity of ATI's contracts with its Mexican customers and the lawfulness of the defendants' alleged interference with ATI's attempted contract with AT&T. In weighing the two sovereigns' respective interests for this purpose, the court of appeals concluded that "Mexico would not have a fundamental policy contravened by the application of Texas law." *Id.* at 12a. Although the court acknowledged that Mexico has an interest in protecting Telmex's domestic monopoly, *id.*, and acknowledged further that "ATI's business . . . enabled Mexican customers to make long distance phone calls in Mexico for prices less than those generally charged by the Telmex monopoly," *id.* at 7a, it refused to acknowledge that ATI was operating as a competing long distance service provider, deeming it "more appropriate to characterize ATI as an exporter of U.S. phone services who incidentally and indirectly resold Mexican telecommunications services," *id.* at 8a. In the court's view, moreover, any "attempts [by Telmex] to tie [its] domestic monopoly power into the international market [should not be construed to be] within the scope of [its] domestic monopoly." *Id.* at 13a. To the extent that Mexico disagreed with that delineation and forbade ATI's activities, the court declared that Mexico's "protectionist" policy should be given no weight, because "it would be an example of a country banning the import of a competitive service for which no legitimate monopoly exists." *Id.* at 17a-18a.

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[3] The court dismissed ATI's state law antitrust claims on the same grounds. Pet. App. 65a, 83a.

Turning to Texas's stake in the case, the court concluded that applying Mexican law would contravene a legitimate policy interest of Texas, *i.e.*, ensuring "the ability of Texas companies to make valid export contracts in Texas for the sale of U.S. services." Pet. App. 13a. The court then proceeded to find ATI's contracts and services legal under Texas law. *Id.* at 19a.

With respect to ATI's antitrust claims, the Fifth Circuit found subject matter jurisdiction under Section 402 of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 96 Stat. 1246, 15 U.S.C. § 6a, based on ATI's allegation that the defendants' actions had "a significant effect" on "a definite and sizable export market" for reorigination services. *Id.* at 25a. The court acknowledged that there could be no cognizable export market if the importation of ATI's services was illegal in Mexico. *Id.* But despite its conclusion that the relevant Mexican law was "capable of multiple interpretations as to what was or was not legal," *id.* at 18a, the court refused to give deference to Mr. Rivas Moncayo's letter and deposition testimony showing that the SCT had interpreted Mexican law to prohibit ATI's activities, *id.* at 28a-29a. Finding that no Mexican statute or regulation expressly prohibited ATI's activities, the court construed Mexican law to permit ATI to compete with Telmex in Mexico without a permit. *Id.* at 28a-32a.[4] And having concluded that ATI's export business was legal in Mexico, the court found no impediment to applying U.S. and Texas antitrust laws to the defendants' alleged actions to exclude ATI from the Mexican telephone market. *Id.* at 32a.

Finally, the Fifth Circuit reversed the district court's holding that it lacked personal jurisdiction over Telmex. The court of appeals agreed with the district court that the totality of Telmex's contacts with Texas did not prove a business presence in Texas sufficient to confer general jurisdiction over Telmex, Pet. App. 36a, and it further concluded that Telmex's nationwide contacts were insufficient to confer personal jurisdiction under the Clayton Act, 15 U.S.C. § 22, *id.* at 37a. But it concluded that ATI's "allegation that Telmex shut down [ATI's] lines in order to harm a Texas business whose services were legal in Mexico suffice[d] to confer [specific] personal jurisdiction over Telmex for the injuries suffered in Texas." *Id.* at 38a.

When Telmex and the MCI and SBC defendants sought rehearing and rehearing en banc, the SCT and the Mexican Federal Telecommunications Commission filed an amicus brief in support, stressing that, contrary to the panel's conclusion, ATI's activities were unambiguously unlawful in Mexico. The SCT explained, moreover, that the panel's finding that ATI's actions were legal in Mexico directly undercut Mexico's policy "to encourage companies that seek to offer telecommunications to Mexican customers to invest in infrastructure development," had the incongruous result of "subject[ing] a Mexican company to damages in the U.S. for complying in Mexico with its obligations under Mexican law – indeed, with an explicit order of the SCT," "undermin[ed] the SCT's sovereign authority," and "encourag[ed] illegal actions in Mexico."[5] Nonetheless, on February 15, 2000, the Fifth Circuit denied without comment the requests for rehearing and rehearing en banc. Pet. App. 1a.

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[4] In a related case, the Texas Court of Appeals concluded that the very same services were illegal in Mexico. *See Long Distance Int'l, Inc. v. Telefonos de Mexico, S.A.*, No. 04-98-00813-CV, 2000 WL 101220 (Tex. App., San Antonio Jan. 31, 2000) (unpublished) (petition for review pending).

REASONS FOR GRANTING THE PETITION

This case presents in stark relief the question that this Court expressly left open in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), regarding the appropriate role of international comity concerns in determining the extraterritorial reach of U.S. antitrust laws. Once it concluded that no Mexican statute or regulation expressly forbade ATI from selling its long distance services in competition with Telmex, the Fifth Circuit saw no impediment to applying U.S. antitrust law to Telmex's alleged anticompetitive conduct in Mexico. To the extent that concerns for international comity affect the extraterritorial application of the Sherman Act, this case presents precisely the types of circumstances in which comity considerations would require dismissal under the analysis employed by other courts of appeals, which weigh the competing concerns to determine which nation has a more direct and substantial interest in regulating the conduct at issue. Certiorari is warranted to resolve the conflict among the courts of appeals over the appropriate role of international comity concerns in determining the extraterritorial reach of U.S. antitrust laws, to clarify the appropriate roles of the Judicial and Executive Branches in enforcing the Nation's trade policies, and to reaffirm this

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[5] Brief of Amici Curiae the Secretary of Communications and Transportation of Mexico and the Federal Telecommunications Commission of Mexico in Support of Petitions for Rehearing and Suggestions for Rehearing En Banc at 5-6.

Country's respect for the internal economic policies of its major trading partners.

Certiorari is also warranted to resolve two other circuit conflicts created by this decision regarding the appropriate standards for determining specific personal jurisdiction over nonresident foreign nationals. First, contrary to the approach taken by other circuits, the court of appeals asserted personal jurisdiction over a nonresident defendant for its actions outside the forum state merely because the plaintiff alleged that it felt the economic effects of those actions in the forum state. Second, also contrary to the decisions of other circuits, the court of appeals failed to weigh concerns for international comity and consider the special hardship to the defendant caused by an exercise of specific personal jurisdiction over a nonresident foreign national for its conduct outside the United States.

I. THE FIFTH CIRCUIT'S FAILURE TO CONSIDER INTERNATIONAL COMITY CONCERNS WHEN DETERMINING THE EXTRATERRITORIAL REACH OF THE SHERMAN ACT CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND WILL CAUSE INAPPROPRIATE CONFLICTS BETWEEN THE JUDICIARY AND THE POLITICAL BRANCHES, AND WITH FOREIGN NATIONS

A. This Case Presents The Question Regarding The Extraterritorial Reach Of The Sherman Act Which The Court Left Open In *Hartford Fire*

Hartford Fire involved an alleged conspiracy among a group of London insurers to coerce primary insurers in the United States to limit their coverage of certain contamination risks in North America. 509 U.S. at 771-72. The foreign defendants did not contest that their conduct had a "direct, substantial, and reasonably foreseeable effect" on domestic commerce within the meaning of Section 402 of the FTAIA, and that the district court therefore had subject matter jurisdiction over the plaintiffs' Sherman Act claims. *Id.* at 795. They argued, however, that, under principles of international comity, the district court should have declined to exercise that jurisdiction. *Id.*

This Court recognized that, "[w]hen it enacted the FTAIA, . . . Congress expressed no view on the question whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity." 509 U.S. at 798.[6] The Court declined, however, to answer that question because, even assuming that international comity concerns might play a role in some cases, it concluded that the London insurers had raised no substantial comity argument. In the Court's view, the London insurers claimed only that application of the Sherman Act to their conduct would conflict with British law, which permitted the conduct. *Id.* The Court held that that posed no true conflict, because the insurers could, by refraining from the challenged conduct, comply with the laws of both sovereigns. *Id.* at 799. The Court expressly left for another day "other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity." *Id.*

Justice Scalia, writing for four Justices in dissent, expressed the view that not only should international comity concerns play an important role in determining the extraterritorial reach of the Sherman Act, but that those concerns should have precluded the application of U.S. antitrust laws to the London insurers. *Hartford Fire*, 509 U.S. at 812-22 (Scalia, J., joined by O'Connor, Kennedy, and Thomas, JJ., dissenting). To the dissent, however, the question was not whether the district court had subject matter jurisdiction – a matter the dissent thought established conclusively by the plaintiffs' assertion of nonfrivolous federal claims – but instead whether, as a matter of substantive law, Congress in the Sherman Act "asserted regulatory power over the challenged conduct." *Id.* at 812-23.

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[6] *See also* H.R. Rep. No. 97-686, 9. 13 (1982) ("If a court determines that the requirements for subject matter jurisdiction are met, [the FTAIA] would have no effect on the court['s] ability to employ notions of comity . . . or otherwise to take account of the international character of the transaction").

In making that determination, the dissent would have applied the longstanding principle that, if possible, "statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." 509 U.S. at 815 (citing *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 382-83 (1959); *Lauritzen v. Larsen*, 345 U.S. 571, 576-77, 583 (1953); and *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963)). More particularly, the dissent quoted the teaching of Judge Learned Hand in *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945), that the general words of the Sherman Act should not be read "'without regard to the limitations customarily observed by nations upon the exercise of their powers,'" 509 U.S. at 816-17, and noted "recent lower court precedent [that] also tempered the extraterritorial application of the Sherman Act with considerations of 'international comity,'" *id.* at 817 (citing *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Savings Assoc.*, 549 F.2d 597, 613 (9th Cir. 1976); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1295 (3d Cir. 1979); *Montreal Trading, Ltd. v. Amax, Inc.*, 661 F.2d 864, 869 (10th Cir. 1981); and *Laker Airways Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909, 938 & n. 109 (D.C. Cir. 1984)).

For guidance in interpreting the extraterritorial scope of the Sherman Act, the dissenting Justices looked to the factors cited in the Restatement (Third) of Foreign Relations Law of the United States § 403(2), such as "the extent to which the activity takes place within the territory of the regulating state"; the "connections, such as nationality, residence, or economic activity between the regulating state and the person principally responsible for the activity to be regulated"; "the character of the activity to be regulated"; the "extent to which other states regulate such activities"; the "degree to which the desirability of such regulation is generally accepted"; the "extent to which another state may have an interest in regulating the activity"; and the "likelihood of conflict with regulation by another state." 509 U.S. at 819.[7] Applying those factors to the facts in *Hartford Fire* – where the conduct took place primarily in the United Kingdom, the defendants were British, and Great Britain had a comprehensive scheme governing its reinsurance markets and a "heavy 'interest in regulating the activity'" – the dissent thought it "unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable." *Id.*

Because the majority in *Hartford Fire* expressly declined to address whether and how the application of U.S. antitrust law may be tempered by concerns for international comity, the Ninth Circuit concluded that *Hartford Fire* left intact prior lower court decisions that declined to exercise extraterritorial jurisdiction under the Sherman Act, courts should decline to exercise it (or, in the dissent's terms, found the conduct at issue beyond the substantive scope of the Sherman Act) where, *inter alia*, the interests of the foreign sovereign were more substantial than the U.S. antitrust concerns at stake. *See Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 845-47 & n.5 (9th Cir. 1996) (holding that, while it clarified what constitutes a conflict with foreign law, *Hartford Fire* did not otherwise affect the balancing test articulated by Ninth Circuit in *Timberlane* and adopted by the Third Circuit in *Mannington Mills*).

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[7] The Third and Ninth Circuits analyze factors similar to those cited by the dissent in *Hartford Fire*, including:

> the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of businesses of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared to conduct abroad.

Timberlane, 549 F.2d at 614; *see Mannington Mills*, 595 F.2d at 1297-98 (adopting test set forth in *Timberlane*).

The Department of Justice and the Federal Trade Commission similarly have interpreted the Court's holding in *Hartford Fire* only to clarify what constitutes a conflict with foreign law for comity purposes. *Antitrust Enforcement Guidelines For International Operations* (hereinafter "*International Antitrust Enforcement Guidelines*") § 3.2 (available at <www.usdoj.gov/atr/public/guidelines/internet.txt>). Observing that comity "reflects the broad concept of respect among co-equal sovereign nations," the agencies reaffirmed that they continue to "take full account of comity factors beyond whether there is a conflict with foreign law." *Id.*

However, notwithstanding that the majority in *Hartford Fire* expressly declined to decide the appropriate role of international comity in determining the extraterritorial reach of the Sherman Act, some courts of appeals have construed *Hartford Fire* to mean that "[i]nternational comity comes into play *only* when there is a true conflict between American law and that of a foreign jurisdiction." *In re Maxwell Comm. Corp.*, 93 F.3d 1036, 1050 (2d Cir. 1996) (emphasis added); *see also United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 8 (1st Cir. 1997) (stating in dictum that comity's "growth in the antitrust sphere has been stunted by *Hartford Fire*," which suggested that comity concerns apply only where there is a true conflict with foreign law); *cf. United Int'l Holdings, Inc. v. The Warf (Holdings) Ltd.*, 2000 U.S. App. LEXIS 8487 (10th Cir. Apr. 28, 2000) (citing *Hartford Fire* for proposition that, "[i]n general, [courts] will not consider comity . . . unless there is a 'true conflict' between the United States law and the relevant foreign law").

Granting certiorari in this case would permit the Court to resolve this conflict among the circuits, and thus to resolve conclusively the role of international comity concerns in determining the extraterritorial reach of the Sherman Act. This case presents that issue starkly. Here there was no harm to any U.S. consumer; the only market affected was the Mexican long distance telephone market; and the only consumers affected were Mexicans. Yet, having concluded that no Mexican law or regulation expressly prohibited ATI from selling long distance telephone service in Mexico in competition with Telmex, the Fifth Circuit refused even to consider whether it was reasonable to judge the lawfulness of Telmex's response under U.S. antitrust laws in lieu of Mexican law. The court of appeals' decision represents a breathtaking exercise of dominion over the markets of a foreign sovereign.

B. The Sherman Act Does Not Apply Extraterritorially To The Conduct Alleged In This Case

Competition in the Mexican long distance telephone market is not a concern of U.S. antitrust law. Although "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States," *Hartford Fire*, 509 U.S. at 796, it is equally clear that the "American antitrust laws do not regulate the competitive conditions of other nation's economies," *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986) (holding that American television manufacturers "cannot recover antitrust damages based solely on an alleged cartelization of the Japanese market").

Moreover, the U.S. antitrust laws "were enacted for the 'protection of *competition*, not *competitors*.'" *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 115 (1986) (citations omitted). *See also, e.g., Brooke Group Ltd. v. Brown &*

Williamson Tobacco Corp., 509 U.S. 209, 224 (1993).[8] That distinction is critical because "Congress designed the Sherman Act as a consumer welfare prescription," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), and while "conduct that eliminates rivals reduces competition, . . . reduction of competition does not invoke the Sherman Act until it harms consumer welfare." *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995). This consumer welfare statute does not morph outside U.S. borders into remedial legislation for U.S. businesses who feel they have been barred unfairly from selling in foreign markets.

The Fifth Circuit recognized that Sherman Act recovery is allowed for foreign conduct only when that conduct injures competition in a U.S. market, but concluded that in this case such injury occurred in a "U.S. export market for reorigination services." Pet. App. 25a. A market, however, is not defined by identifying some – or in this case, one – of the sellers in it. Irrespective of whether ATI's business is characterized as "exporting reorigination services" or simply as providing long distance services to Mexican consumers, it is undisputed that the only consumers affected by the loss of ATI as a competitor were callers in Mexico. *Id.* at 25a, 97a-98a. For purposes of analyzing ATI's claim, therefore, any harm to competition occurred in the market for providing long distance services to Mexican consumers. The injury that ATI alleges – loss of a U.S. export opportunity which had no effect on U.S. consumers – is simply not a significant concern of the U.S. antitrust laws.[9]

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[8] This fundamental principle is also reflected in the requirement that, to recover damages under Section 4 of the Clayton Act, a plaintiff must allege "antitrust injury," that is, that it was injured by an anticompetitive aspect of the defendant's conduct. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990). The test for subject matter jurisdiction under Section 4a of the FTAIA was "not intend[ed] to alter existing concepts of antitrust injury or antitrust standing." H.R. 97-686, at 11.

[9] Although older cases, predating the Court's current understanding of antitrust injury, have permitted claims based on anticompetitive

The Fifth Circuit compounded its error in overstating the U.S. antitrust interests implicated in this case by refusing to consider the competing (and more compelling) interests of Mexico. Mexico, like any other sovereign nation, has a substantial and legitimate interest in regulating the provision of telecommunication services to its citizens. During the period in question, Telmex had government-granted exclusivity and was the sole authorized provider of international long distance services in Mexico. Pet. App. 101a-102a. ATI's complaint is that Telmex took action to stop ATI from offering a competing service that "enabled Mexican customers to make long distance calls in Mexico for prices less than those generally charged by the Telmex monopoly." *Id.* at 7a. Mexico plainly has a substantial interest in deciding the lawfulness of Telmex's conduct.

The Fifth Circuit, however, looked only to whether then-existing Mexican telecommunications statutes and regulations explicitly prohibited ATI's activities. Wholly aside from whether the court misinterpreted the relevant Mexican laws and regulations (which it did) and improperly ignored the views of the Mexican Ministry responsible for enforcing those laws and regulations (which it also did), the court erred (and parted company with the Third, Ninth, and D.C. Circuits) by refusing to give any weight to Mexico's far stronger interests in regulating competition in its own telephone markets and to the implications of U.S. antitrust enforcement on Mexican telecommunications policy.

The Fifth Circuit's refusal to consider Mexico's interests in this matter is particularly striking because the court itself characterized ATI's service as an exploitation of an

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conduct by U.S. businesses with respect to U.S. export commerce, *see, e.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 113 n.8 (1969); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 599 (1951), this Court has never approved the exercise of antitrust jurisdiction over the alleged anticompetitive conduct of a foreign company whose conduct affected only consumers in its home country.

unintended loophole in Mexican law: the court concluded that ATI's conduct was not illegal in Mexico in part based on its perception that the Mexican government could not have anticipated the manner in which ATI sought to compete with Telmex, Pet. App. 30a, and it noted that new Mexican legislation was enacted soon after the activities at issue to explicitly prohibit services such as ATI's, *id.* at 4a.

Contrary to the Fifth Circuit's view, determining the transnational reach of U.S. antitrust laws requires more than a hairsplitting parsing of foreign law. Rather, appropriate consideration of international comity concerns requires a court to consider more broadly which nation has the stronger interest in regulating the conduct at issue and whether applying U.S. antitrust law may interfere with the other nation's sovereignty. *See Timberlane*, 549 F.2d at 614 (considering, *inter alia*, "the degree of conflict with foreign law or policy"); *Antitrust Enforcement Guidelines* § 3.2 (considering, *inter alia*, the "relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad," the "degree of conflict with . . . articulated foreign economic policies," and the "extent to which the enforcement activities of another country with respect to the same persons . . . may be affected"). The Fifth Circuit made no attempt to do that.

To the extent that the Fifth Circuit considered Mexico's sovereign interests at all, it did so only when applying Texas choice of law principles to ATI's state law claims. In that context, the court dismissed as irrelevant any impact on Mexico's telecommunications policy, because in the Fifth Circuit's view Mexico could have no *legitimate* interest in requiring Mexicans to use Telmex's service for international calls. *See id.* at 17a ("[I]f Mexican law banned the import of U.S. switching services or the incidental resale of Mexican capacity by a non-provider, it would be a policy designed to increase the monopoly power of a domestic company outside the territorial boundaries of that country. Such policies do not demand comity."); *accord id.* at 11a-12a; *see also id.* at

30a-31a (commenting on Mexican policy in course of interpreting Mexican law).

Contrary to the Fifth Circuit's view, Pet. App. 7a-8a, although Mexico has (and has asserted) no interest in the means by which ATI retransmitted its customers' international 800 calls once the calls connected to circuits in the U.S., Mexico is the only sovereign with a legitimate interest in whether (and under what conditions) foreign companies will be permitted to provide long distance services to Mexican consumers in competition with Telmex. Whether Telmex acted within its rights when it disconnected ATI's competing service should have been a matter for the Mexican regulators and/or courts to decide.

If allowed to stand, the Fifth Circuit's holding will not only exacerbate the conflict in the circuits over the extraterritorial reach of U.S. antitrust laws and promote conflict with this Country's trading partners, *see Mannington Mills*, 595 F.2d at 1296-97, but it will also enmesh the federal judiciary in international trade issues that are more appropriately handled by the Executive Branch. Although Congress has authorized U.S. courts to provide relief to plaintiffs suffering anticompetitive injury in the U.S. market, Congress has long entrusted to the Executive Branch the task of setting U.S. trade policy.[10] The Executive Branch has exercised its trade authority in negotiating numerous agreements with foreign nations, including the General Agreement on Trade in Services; indeed, under that agreement, Mexico has participated in the 1998 World Trade Organization Basic Telecommunications Agreement, committing to allow non-

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[10] *See, e.g., Field v. Clark*, 143 U.S. 649, 690 (1892) ("in the judgment of the legislative branch of the government, it is often desirable, if not essential for the protection of the interests of our people, against the unfriendly or discriminating regulations established by foreign governments, . . . to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations").

Mexican telecommunications carriers entry into the Mexican market.[11] Nor is the Executive Branch's authority limited to purely governmental trade barriers. Congress also has vested the Executive Branch with the authority to take action if it finds that a foreign government has tolerated "systematic anticompetitive activities by enterprises" that have the effect of restricting "access of U.S. goods and services to a foreign market." 19 U.S.C. § 2411.

Through the overreaching exercise of jurisdiction under the Sherman Act, the Fifth Circuit has impinged significantly upon the Executive Branch's authority to establish and enforce U.S. trade policy. Under the Fifth Circuit's view of the law, a U.S. business improperly denied entry into a foreign market because of the actions of foreign firms need no longer turn to the Executive Branch, as Congress envisioned. *See, e.g.*, 19 U.S.C. § 2412(a)(1). Rather, the U.S. business can choose instead simply to haul the foreign firms before a U.S. court, which would then be required to adjudicate the antitrust claim regardless of the Executive Branch's trade or foreign relations priorities.

For all of the reasons stated above, the Court should grant certiorari to resolve the conflict in the circuits over the extraterritorial application of the U.S. antitrust laws.

II. THE FIFTH CIRCUIT ERRED AND EXACERBATED A CONFLICT IN THE CIRCUITS BY HOLDING THAT THE DISTRICT COURT HAD PERSONAL JURISDICTION OVER TELMEX MERELY BECAUSE ATI WAS LOCATED IN TEXAS.

Due Process permits a court to exert personal jurisdiction over a nonresident defendant only when the defendant has "'purposefully established 'minimum contacts' in the forum state,'" *Asahi Metal Indus. Co. v. Superior*

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[11] List of Specific Commitments of Government of Mexico, World Trade Organization, GATS/SC/56/Suppl. 2 (Apr. 11, 1997), available at <www.wto.org/wto/new/sc5652.wp5>.

Court, 480 U.S. 102, 108 (1987) (citations omitted), and "maintenance of the suit 'does not offend traditional notions of fair play and substantial justice.'" *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))). Absent continuous and systematic contacts with the forum sufficient to establish "general jurisdiction" over a nonresident defendant, a court may exercise "specific jurisdiction" over such defendant only where the suit "arises out of or [is] related to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8, 415 n.9 (1984).

In *Calder v. Jones*, 465 U.S. 783 (1984), this Court held that specific personal jurisdiction is sometimes proper even though the defendant's conduct giving rise to personal jurisdiction took place outside the forum. *Calder* was a libel action brought in California by actress Shirley Jones, a California resident, against a reporter and editor of the National Enquirer who co-wrote and published in Florida an allegedly libelous article about Jones. This Court concluded that personal jurisdiction was proper in California based on the effects of the defendants' Florida conduct in California. The Court emphasized that the defendants' "intentional, and allegedly tortious, actions were expressly aimed at California," where the Enquirer had its largest circulation, and that the defendants knew that "the brunt of the harm, in terms both of [the plaintiff's] emotional distress and injury to her professional reputation" would be suffered in California, "where she live[d] and work[ed]." *Id.* at 789-90.

The courts of appeals disagree as to the showing needed to satisfy *Calder*'s "effects" test. Most courts of appeals considering specific personal jurisdiction over nonresident defendants find the exercise of jurisdiction proper under *Calder* only in a limited class of cases sharing the critical elements present in *Calder*. As the Third Circuit has stated:

> for *Calder* to apply, the plaintiff must allege facts sufficient to meet a three-prong test. First, the defendant must have committed an intentional tort. Second, the plaintiff must have felt the brunt of the harm caused by that tort in the forum, such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of the tort. Third, the defendant must have expressly aimed his tortious conduct at the forum, such that the forum can be said to be the focal point of the tortious activity.

IMO Indus., Inc. v. Kiekert AG, 155 F.3d 254, 256 (3d Cir. 1998). *Accord Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1486 (9th Cir. 1993) ("personal jurisdiction can be predicated on (1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered – and which the defendant knows is likely to be suffered – in the forum state"). This approach narrowly tracks the bases for this Court's holding in *Calder*, and remains faithful to this Court's concern that the proper focus is "on 'the relationship among the defendant, the forum, and the litigation.'" *Calder*, 465 U.S. at 788 (quoting *Shaffer v. Heitner*, 433 U.S. 310, 316 (1945)). The courts following this approach have refused to find jurisdiction based solely on the allegation that the defendant knowingly harmed a plaintiff domiciled in the forum state. *E.g., IMO Indus.*, 155 F.3d at 263.

In contrast to the majority position, the Seventh Circuit applies the "effects" doctrine far more broadly, asserting personal jurisdiction over a nonresident defendant whenever the plaintiff alleges that the defendant's actions had effects in the forum state, regardless of whether the defendant's actions were expressly aimed at that state or whether that state was the focus of the injury. *E.g., Janmark, Inc. v. Reidy*, 132 F.3d 1200, 1202 (7th Cir. 1997) ("there can be no serious doubt after [*Calder*] that the state in which the victim of a tort suffers the injury may entertain a suit against the accused tortfeasor").

The Third Circuit has noted that the Seventh Circuit's interpretation of *Calder* is squarely in conflict with the analytic framework adopted by the other courts of appeals that have considered the issue. *See IMO Indus.*, 155 F.3d at 263-264 (declining to follow the "counterpoint" of *Janmark* as in conflict with "better reasoned" decisions in other circuits) (citing, *inter alia*, *Noonan v. Winston Co.*, 135 F.3d 85 (1st Cir. 1998); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997); *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617 (4th Cir. 1997); *Far West Capital, Inc. v. Towne*, 46 F.3d 1071 (10th Cir. 1995) (also noting conflict among circuits); *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993); *Southmark Corp. v. Life Investors Inc.*, 851 F.2d 763 (5th Cir. 1988)).

In this case, notwithstanding its own prior application of the majority approach in *Southmark*, the Fifth Circuit applied the "effects" test as the Seventh Circuit would have applied it. The court stated that jurisdiction was proper over Telmex because ATI alleged that Telmex "harm[ed] a Texas business through the willful cancellation of a necessary portion of that business's services," and that conduct "ha[d] reasonably foreseeable consequences in Texas." Pet. App. 38a; *see also id.* ("ATI had to be located somewhere and Telmex knew where that was"). Under the majority approach, those findings would have been insufficient. To establish specific jurisdiction, the court would have had to conclude further (i) that Telmex expressly aimed its actions at Texas and (ii) that ATI felt the brunt of the harm in Texas. The Fifth Circuit had no basis to make either finding.

As to the targeting requirement, the Fifth Circuit stated that Telmex "directed its actions towards Texas by canceling phone service linked to Texas" in order "to harm a Texas business." Pet. App. 37a. In the court's view, Telmex's conduct was analogous to "an electric company send[ing] an electric spike through its lines, damaging computers on the other end." *Id.* at 38a. The comparison is inapt. Whereas the electric company's goal is to harm the computers at their location, Telmex acted to protect its market in Mexico and its conduct had its primary effects in Mexico. ATI's corporate location was completely irrelevant to Telmex, which was concerned only with stopping what it (and the SCT) viewed as ATI's illegal provision of long distance telephone services to Mexican customers in Mexico.[12] While ATI happened to be located in Texas, and ATI alleges that it experienced economic harm in Texas, ATI's customers could use its service to call not just Texas but anywhere in the United States or the rest of the world, and any actual injury to ATI occurred in Mexico, where ATI lost its customers.

The Fifth Circuit's view that conduct is expressly aimed at a jurisdiction within the meaning of *Calder* so long as the actor knows that effects will be felt there reduces the targeting requirement to foreseeability, which "alone has never been a sufficient benchmark for personal jurisdiction under the Due Process clause." *World-Wide Volkswagen*, 444 U.S. at 295.[13] Telmex's mere knowledge of ATI's location in Texas is patently insufficient "to satisfy the targeting prong of [*Calder's*] effects test." *See, e.g., IMO Indus.*, 155 F.3d at 263 ("[t]he mere allegation that the plaintiff feels the effect of the defendant's tortious conduct in the forum because the plaintiff is located there is insufficient to satisfy *Calder*"); *Far West Capital, Inc. v. Towne*, 46 F.3d 1071 (10th Cir. 1995) (mere fortuity of plaintiff's corporate domicile in forum insufficient to confer personal jurisdiction over defendant); *cf. Wenz v. Memery Crystal*, 55 F.3d 1503, 1508 (10th Cir. 1995) (applying analogous state law standard); *Mareno v. Rowe*, 910 F.2d 1043, 1046 (2d Cir. 1990) (same).

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[12] The court of appeals' observation (Pet. App. 37a) that Telmex ran its lines up to the border with Mexico "for the express purpose of serving Texas residents with Mexican phone service" is both wrong and irrelevant. It is wrong because Texas residents do not receive Mexican phone service. Rather, Telmex and its U.S. correspondents interconnect with each other to enable their customers to place and receive calls between Mexico and the U.S. The court's observation is irrelevant because this case is about the provision of U.S.-bound telephone service to Mexicans, *not* the provision of Mexico-bound telephone service to Texans. Fees paid to Telmex by U.S. carriers for the use of Telmex's lines to terminate calls made by Texans to Mexico have nothing whatsoever to do with whether Telmex's conduct in this case was sufficient to establish specific personal jurisdiction.

[13] As this Court has explained, the only foreseeability that is constitutionally sufficient for personal jurisdiction purposes is the foreseeability that "the defendant's conduct and connection with the forum are such that he should reasonably anticipate being haled into

As to the location of the harm, the Fifth Circuit made no finding that ATI suffered the brunt of its alleged harm in Texas because, on this record, it could make no such finding. The relevant harm under the majority approach to *Calder* is the *injury* caused by the allegedly tortious conduct, not the financial *damages* caused by the injury. In this case, the *injury* to ATI was the loss of its ability to provide long distance telephone service to Mexican customers, and that happened in Mexico. *See United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 37-38 (1st Cir. 1999) (rejecting claim of personal jurisdiction based on "effects" test and distinguishing injury, which occurred outside forum, from economic effects felt by plaintiff within forum); *Noonan*, 135 F.3d at 90-91 (personal jurisdiction not proper under *Calder* although plaintiffs felt effects within forum); *Wenz*, 55 F.3d at 1508-09 ("[t]hat [the plaintiff] may be economically impacted in [the forum], simply because he lives there, is insufficient to establish personal jurisdiction" under analogous state law standard); *General Elec.*, 991 F.2d at 1387-88 (*Calder* not satisfied by effects within forum where "focal point of the alleged wrongdoing" was outside forum);

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court there." *World-Wide Volkswagen*, 444 U.S. at 297. Here, where Telmex allegedly took action in Mexico allegedly causing ATI to lose customers in Mexico, Telmex could not reasonably foresee being haled into court in Texas.

Mareno, 910 F.2d at 1046 ("the situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are subsequently felt by the plaintiff") (internal quotation marks and citations omitted); *American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp.*, 439 F.2d 428, 433-35 (2d Cir. 1971) (distinguishing between "injury" and economic "consequences" for purposes of determining personal jurisdiction).

This Court's plenary review is warranted because the Fifth Circuit's approach to personal jurisdiction highlights the confusion among the courts of appeals over the proper application of *Calder's* "effects" test, and the Fifth Circuit's assertion of jurisdiction over a Mexican national for conduct that affected a Texas company's ability to sell telephone service to Mexicans in Mexico demonstrates the dangerously overbroad reach of an "effects" test that requires only foreseeable effects in the subject forum.

III. THE FIFTH CIRCUIT SHOULD HAVE CONSIDERED MEXICO'S SOVEREIGN INTERESTS AND TELMEX'S FOREIGN NATIONALITY WHEN DETERMINING WHETHER TO EXERCISE PERSONAL JURISDICTION OVER TELMEX

In *Asahi*, this Court admonished that, before "stretching the long arm of personal jurisdiction over national borders," 480 U.S. at 114, a court must carefully consider the interests of other nations affected by the assertion of jurisdiction, as well as the foreign policy interests of the United States. *Id.* at 115. The Court explained that such a heightened concern is appropriate not only as an expression of the respect to be afforded one sovereign by another under norms of international law, but to protect the federal government's "foreign relations policies" and to focus the court's analysis on the "serious burdens on an alien defendant" forced to defend itself in a foreign legal system – a circumstance in which an exercise of personal jurisdiction that ignores sovereign interests may endanger the United States' friendly diplomatic relations. *Id.*

Consistent with the Court's direction, the Second, Sixth, Ninth, and Tenth Circuits require a plaintiff asserting a claim against a nonresident foreign national to meet a higher burden in establishing personal jurisdiction than a plaintiff asserting a similar claim against a nonresident who resides in another state. *See, e.g., Leasco Data Processing Equip. Corp. v. Maxwell,* 468 F.2d 1326, 1341 (2d Cir. 1972) ("effects" doctrine "must be applied with caution, especially in an international context"); *Theunissen v. Matthews,* 935 F.2d 1454, 1460 (6th Cir. 1991) (noting that "reasonableness inquiry [must] giv[e] special weight to the 'unique burdens upon one who must defend oneself in a foreign legal system'") (quoting *Asahi,* 480 U.S. at 114); *Amoco Egypt Oil Co. v. Leonis Navigation Co.,* 1 F.3d 848, 852 (9th Cir. 1993) ("Where, as here, the defendant is from a foreign nation rather than another state, the sovereignty barrier is high and undermines the reasonableness of personal jurisdiction"); *OMI Holdings, Inc. v. Royal Ins. Co. of Canada,* 149 F.3d 1086, 1096 (10th Cir. 1998) (same).

The opinion of the Fifth Circuit, in contrast, does not acknowledge that Mexico's sovereign interests or Telmex's foreign nationality merit any consideration in the assertion of personal jurisdiction over Telmex. *See* Pet. App. 37a-38a. This was no mere oversight. In *Wein Air Alaska, Inc. v. Brandt,* 195 F.3d 208 (5th Cir. 1999), the Fifth Circuit held personal jurisdiction proper in Texas over a nonresident German citizen despite his claims that the assertion of personal jurisdiction "would be unfair and unreasonable because he is a German citizen, most of the witnesses are in Germany, the courts in the U.S. would not be able to subpoena the German witnesses, German law applies to all of the issues, [and] the judicial system's interest in efficiency would dictate Germany should resolve this dispute." *Id.* at 215. The Fifth Circuit gave short shrift to the defendant's arguments, concluding that while requiring him to litigate in

Texas would be burdensome, "once minimum contacts are established, the interests of the forum and the plaintiff justify even large burdens on the defendant." *Id.*

The Fifth Circuit's failure to appreciate the special concerns that are implicated by a transnational assertion of personal jurisdiction was even more egregious here than in *Wein*, because this case is *about* the implementation of the Mexican Government's telecommunications policy, and its resolution turns on the proper interpretation of Mexican telecommunications law. *See, e.g.*, Pet. App. 27a ("At issue is the legality of ATI's business under Mexico law"). As in the United States, telecommunications is highly regulated in Mexico, and Mexico has powerful interests in maintaining and enforcing its public policy in this field. Yet, the Fifth Circuit gave no weight to Mexico's sovereign interests, no consideration to the hardship it imposed on Telmex by forcing Telmex to litigate in the United States the lawfulness of its conduct in Mexico, and no thought to whether Mexico's courts might be better positioned to decide the central questions of Mexican law.

Had this case arisen in the Second, Sixth, Ninth, or Tenth Circuits, those courts of appeals would carefully have considered both Mexico's sovereign interests and Telmex's foreign nationality, and would have demanded a heightened showing before asserting personal jurisdiction over Telmex. No different result should have obtained here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully ssubmitted.

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May 15, 2000

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 98-50881

ACCESS TELECOM, INC.,
PLAINTIFF-APPELLANT,
v.
MCI TELECOMMUNICATIONS CORPORATION, ET AL.
DEFENDANTS-APPELLEES.

Decided February 15, 2000

ON PETITIONS FOR REHEARING AND REHEARING EN BANC

Before: GARZA, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM.

The Petitions for Rehearing are DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing *En Banc*, (Fed. R. App. P. and 5th Cir. R. 35) the Petitions for Rehearing *En Banc* are also DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 98-50881

ACCESS TELECOM, INC.,
PLAINTIFF-APPELLANT,
v.
MCI TELECOMMUNICATIONS CORPORATION, ET AL.,
DEFENDANTS-APPELLEES.

Decided December 1, 1999
Corrected December 23, 1999

OPINION

Before: R. GARZA, HIGGINBOTHEM, and DAVIS, Circuit Judges.

HIGGINBOTHEM, Circuit Judge.

I.

During 1993 and 1994, Access Telecom, Inc. ("ATI"), a corporation based in Texas, exported U.S. phone services to customers in Mexico. These services allowed Mexican customers to place U.S.-based phone calls directly from Mexico. Customers first called ATI in Texas and then entered the new phone number they wanted to call. ATI dialed that new number from the U.S. and effectively spliced the customer's first call to the new call, enabling the customer to communicate with the new destination. As a result, each call had two legs: the Mexican leg from Mexico to Texas and the U.S. leg from Texas to the final destination.[1]

The benefit to ATI's customers from this arrangement was that the cost of the two-legged call was less than the cost of a normal call from Mexico through Telefonos de Mexico (Telmex). The price discrepancy existed because Telmex had a government granted monopoly until 1996. Thus, the rate on a typical call from Mexico to California was controlled by Telmex for its entire length. Under ATI's setup, Telmex controlled only the rate for the Mexican leg of the call. The applicable rate for the U.S. leg of the call was a U.S. rate.

The Mexican leg of each call was carried on toll free numbers that ATI received from MCI. MCI in turn leased the lines for these numbers from Telmex. In other words, MCI leased the Telmex lines that connected Mexico to Texas. Telmex's lines crossed the border into Texas where they interconnected with U.S. lines. Telmex's contracts with MCI apparently neither foresaw nor forbid the subsequent "reorigination" as practiced by ATI or other companies, and in fact, MCI offered similar reorigination services of its own.

ATI's contracts with MCI incorporated the terms and conditions of MCI's U.S. "filed tariff" which provided that MCI calls may not be acquired and used for resale in foreign jurisdictions once MCI's foreign partners have blocked or interrupted MCI or have threatened to do so for such reasons. The tariff also stated that MCI was not liable for acts or omissions of other companies who furnished a portion of MCI's 800 service. Finally, the tariff prohibited the use of MCI services for unlawful purposes.

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[1] At some point, ATI also employed switching services in New York.

Mexican law required a permit to be a provider of telecommunications services in Mexico. ATI never obtained such a permit, maintaining it did not need to do so because it was not a provider. Under ATI's interpretation of Mexican law, a provider was an entity that both owned and operated telecommunications infrastructure within Mexico, which ATI did not do (as opposed to reselling service directly or indirectly, which ATI perhaps did do). Subsequent to the time period relevant in this lawsuit, Mexico revamped its telecommunications laws and now explicitly requires a permit to engage in resale activity.

In October 1993, Jose Rivas Moncayo of the office of the Mexican Secretary of Communications and Transportation (SCT), sent MCI a letter requesting that MCI halt the services of companies offering "call-back services." Call-back involved a procedure whereby a customer called a U.S. company, and the U.S. company did not answer the call. Instead, the company would use a form of caller-id to locate the customer and then call the customer back. Under call-back services, Telmex received no revenue for the initial outbound call because that call was never "answered." Such services used Telmex phone lines to communicate location information without paying Telmex anything for that privilege. ATI's service, however, paid Telmex exactly what Telmex had contracted with MCI to receive for outbound calls using the lines from Mexico to Texas. ATI's service did not operate through call-back, and MCI did not terminate ATI's service. Subsequent to the time period relevant in this lawsuit, the SCT issued further communications condemning practices that achieve similar results as "call-back" services.

On April 19, 1994, Telmex notified MCI of its intention to disconnect customers who were using its service for resale. The list of 85 customers that it provided, however, did not include ATI. On April 29, 1994, MCI received another letter, requesting a list of customers in the resale business, but

MCI refused to provide such a list. The letter requesting customers was written on Telmex letterhead by an employee of SBC International, a subsidiary of Southwestern Bell. Southwestern Bell is part of a consortium that owns a controlling stake in Telmex.

Telmex allegedly began disconnecting 800 numbers on July 21, 1994, without warning. Previously it had assured MCI that it would give notice of disconnection so MCI could warn MCI's customers. On September 28, 1994, Telmex sent MCI a list of prohibitions on the use of MCI's numbers, threatening to terminate all of MCI's Mexican business without notice if MCI did not cooperate. ATI's numbers, save three, were disconnected on October 19, 1994; the rest were disconnected soon thereafter. At this time, ATI was earning approximately $3 million a year.

There is disagreement whether MCI provided Telmex with ATI's numbers. According to the deposition of Carol Ansley, an SBC employee, Ansley sent Rafael Perez Aguilar of Telmex a list of ATI's numbers, and Ansley testified that as far as she knew, MCI had not provided SBC with ATI's numbers. ATI, however, discovered a cover memo written by Ansley, stating that "attached you will find a list of I-800 numbers MCI has identified as being with Access Telecom." ATI also notes that John Bachman, an MCI manager, sent an e-mail on October 18, to an MCI employee, Laura Alvarado, instructing her to "take down" ATI's numbers. In Alvarado's deposition, however, she insists that she did not provide the numbers to Telmex. Even MCI has stated that the provision of ATI's numbers to third parties without permission would be in violation of U.S. law.

In an effort to continue providing service to its customers, ATI sought alternative service from AT&T. According to ATI, MCI immediately informed SBC and Telmex of ATI's attempt to obtain service from AT&T. Telmex allegedly assured MCI that ATI would not be able to reestablish the numbers through AT&T. ATI ultimately could not obtain alternate service through AT&T. ATI's business collapsed, along with approximately 80 other similar U.S. companies.

II.

In June 1995, MCI commenced arbitration proceedings seeking to recover payment of ATI's phone bill, ultimately receiving an award for nearly $1.2 million. In July 1995, ATI sued Telmex, SBC, and MCI in Texas state court, alleging claims of breach of contract, tortious interference with contract, negligent misrepresentation, promissory estoppel and federal and state antitrust violations. The case was removed and transferred to the Western District of Texas. The federal court granted Telmex's motion to dismiss all claims against it for lack of personal jurisdiction.

ATI moved for partial summary judgment on the issue of the lawfulness of its activities, which the district court denied. MCI and SBC moved for summary judgment on all of ATI's claims, which the district court granted. The court held that the filed tariff doctrine barred ATI's claims for negligent misrepresentation and breach of contract. The district court granted summary judgment on a promissory estoppel claim, holding that ATI could not justifiably rely on representations by MCI as to Mexican law.

The district court also held that ATI could not recover on its claim alleging that MCI tortiously interfered with ATI's customer contracts because this was essentially a breach of contract claim and was barred by limitation of liability provisions in MCI's tariff. In addition, the court rejected ATI's claim that MCI conspired with Telmex and SBC to block ATI from contracting with AT&T for service because ATI never sought or obtained a permit from the SCT and thus ATI's prospective relations with AT&T would have been illegal. Finally, the district court rejected ATI's antitrust claims on the ground that the conduct of which ATI complained did not have a direct, substantial, and reasonably foreseeable effect on U.S. domestic or import commerce or export business.

On appeal, ATI challenges the dismissal of its tortious interference and antitrust claims, the denial of summary judgment in ATI's favor with respect to the lawfulness of ATI's activities, and the dismissal of Telmex on personal jurisdiction grounds. ATI separately complains that merits discovery was improperly limited.

III.

A. Characterization of ATI's Business

The proper resolution of many issues in this case depends on the characterization of ATI's business. ATI characterizes its business as exporting U.S. reorigination services to Mexican customers. The defendants characterize ATI's business as providing a Mexican telecommunications service in Mexico. At first glance, the defendant's characterization has appeal. No matter how ATI's business is described, the end result enabled Mexican customers to make long distance phone calls in Mexico for prices less than those generally charged by the Telmex monopoly. This characterization, however, confuses the ends with the means.

In the past, phone calls may have been seen as indivisible commodities. Today, that is too simple a view. Admittedly, by selling the "U.S. leg" of a call to Mexican customers, ATI enabled cheaper long distance communication. That is not the same as being a Mexican telecommunications provider. A distinction exists between "provider" and "reseller," which is easier to see in a more familiar context.

If ATI and Telmex were shipping companies, ATI might transport goods solely between U.S. cities. If Mexican customers shipped their goods to ATI in Texas, ATI could then transport them to another destination in the U.S. Alternatively, Mexican customers could ship directly to their final destination using Telmex alone. Shipping to New York via ATI might be cheaper, however, than shipping via

Telmex. To say that ATI is a Mexican shipping provider would be imprecise. No matter which company the customer uses, Telmex, as a monopoly, is the only provider of shipping service from Mexico to Texas, and in every instance Telmex receives the previously agreed rate for its services. Thus, in Mexico, ATI is at most a reseller of Telmex's shipping service, although even the label of "reseller" is debatable.

To equate resale with provision, however, entails that every business is a provider if that business ships goods to its customers via Telmex and charges the customer for the shipping cost. In our case it would entail that every business which has a toll free number, yet which charges the cost of the phone service back to the customers, is a telecommunications provider because it technically is "reselling" phone service. This ignores the crucial difference between resellers and providers, which is that a reseller cannot compete with a monopoly provider because the provider is the reseller's only supplier. The reseller can only undersell the provider if the provider sells its services to the reseller for less than they are worth. That is not the same kind of competition a provider faces against another provider. Competition between the provider and the reseller is at the mercy of the provider and the provider's knowledge or ignorance of the market.

Because of this difference, it is more appropriate to characterize ATI as an exporter of U.S. phone services who incidentally and indirectly resold Mexican telecommunications services. In a real sense, ATI was not even the primary reseller of Mexican telecommunications services. MCI was the reseller, under contract from Telmex. ATI purchased MCI's services and MCI billed ATI for the calls made to ATI's numbers by ATI's customers who were purchasing U.S. service. ATI may have recouped the cost of the Mexican leg of the call from its customers just as any other business may recoup the cost of toll free phone service through its service fees. ATI's setup is thus the same as any

American business which contracted to offer toll free 800 numbers to Mexican customers in order to provide service across the phones, such as touch tone brokerage service or even $3.95/minute astrological advice. The only difference is that ATI offered U.S. phone service rather than another service delivered by phone. While this may make ATI appear to be a Mexican "provider," this ignores the foregoing distinctions. To not distinguish between direct providers, direct resellers, and indirect resellers ignores the competitive reality that it is the providers who determine whether subsequent resales are profitable; it also leads to the illogical result that all businesses are telecommunications providers. This characterization of ATI's business is compatible with one interpretation of the laws which were in place in Mexico at the time, requiring permits only for the joint installation, operation, and exploitation of infrastructure. ATI's claim that the "and" has its normal conjunctive meaning agrees with these distinctions, because this reading separates true providers from mere resellers. With these distinctions in mind, we now address the tortious interference issues.

B. Tortious Interference

1. Choice of Law

To properly decide the tortious interference issues, we must make three choice of law decisions: first, which law governs ATI's tort cause of action; second, which law governs the validity of the contracts and prospective business relations which form the basis of the tortious interference claims; and third, whether any foreign law invalidates the contracts for other reasons. A federal district court must follow the choice-of-law rules of the state in which it sits. *See, e.g., St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202, 205 (5th Cir. 1996).

(a) Tort Choice of Law

The first choice is which law governs ATI's tort cause of action. Texas follows the most significant relationship test of the Restatement (Second) of Conflict of Laws § 145, for these decisions. *See Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979). Under the modern "most significant relationship" test, courts considers: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the relationship between the parties, if any, is centered. *See SnyderGeneral Corp. v. Great Am. Ins.*, 928 F. Supp. 674, 677 (N.D. Tex. 1996), *aff'd*, 133 F.3d 373 (5th Cir. 1998). Since Texas was the site of injury, home to the injured business, and place of export of the U.S. portion of the business, it would be reasonable to apply Texas law; however, the parties appear to assume without argument that Texas law governs, and so, without deciding, shall we.

Thus, we examine Texas law to determine the requirements for a tortious interference claim. Under Texas law, the existence of a valid contract (or the potential for one in claims for interference with prospective contracts) is an element of a claim for tortious interference. *See Juliette Fowler Homes, Inc. v. Welch Associates, Inc.*, 793 S.W.2d 660, 665 (Tex. 1990). There is no remedy for interference with illegal contracts, *see Ben E. Keith Co. v. Lisle Todd Leasing, Inc.*, 734 S.W.2d 725, 727 (Tex. App.-Dallas 1987, writ ref'd n.r.e.).

(b) Contract Choice of Law

The ATI contracts at issue in this case include ATI's contracts with its Mexican customers, ATI's contracts with MCI, and ATI's attempted contracts with AT&T. The second choice of law question arises because we must determine whether these contracts were valid. Validity of a contract, however, is determined by the law which governs the contract, which calls for another choice of law analysis, this time using the modern "most significant relationship" test of the Restatement (Second) of Conflict of Laws as applied to contracts, which Texas has adopted. *See Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420-21 (Tex. 1984).

ATI, based in Texas, exported Texas reorigination services to Mexican customers and resold Mexican telecommunications service. These customer contracts had choice of law provisions identifying Texas as the applicable law and place of formation. In Texas, contractual choice-of-law provisions are ordinarily enforced if the chosen forum has a substantial relationship to the parties and the transaction. *See De Santis v. Wackenhut*, 793 S.W.2d 670, 677-78 (Tex. 1990). However, a choice-of-law provision will not be applied if another jurisdiction has a more significant relationship with the parties and their transaction than the state they choose, that jurisdiction has a materially greater interest than the chosen state, and the jurisdiction's fundamental policy would be contravened by the application of the law of the chosen state. *See* Restatement (Second) of Conflict of Laws § 187.

The defendants argue that the choice of law clauses in the ATI customer contracts are not determinative, because these contracts concerned issues of payment and formation, mostly stating that the contracts were formed in Texas and would be payable in Texas in U.S. dollars. The contracts did not concern the terms of ATI's actual provision of service. It is true that contractual choice of law clauses are construed narrowly. *See Thompson and Wallace of Memphis, Inc. v. Falconwood Corp.*, 100 F.3d 429 (5th Cir. 1996). However, the defendants' argument cuts both ways. To the degree that these contracts do not concern the services allegedly illegal in Mexico, it becomes harder to argue illegality of those contracts under Mexican or Texas law; furthermore, so long as these contracts were interfered with, the fact that a separate service agreement was not interfered with does not matter, since the interference claim only needs one contract as its basis.

Without deciding how determinative the choice of law clauses are, however, it appears that there is no demand to choose Mexican over Texas law under a most significant relationship test. The Restatement § 188 states that

> in the absence of an effective choice of law by the parties . . . the contacts to be taken into account . . . to determine the law applicable to an issue include: (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

In this case, we have a very symmetric relationship between the parties and the services provided. Each forum is home to one of the parties, one forum's business is exporting services, the other forum's resident is receiving services, the U.S. favors competition in telecommunications, Mexico at the time did not. ATI's indirect resale of the Mexican leg of the service may center in Mexico, but even a portion of that service occurs in Texas, since Telmex's lines cross into Texas and interconnect at the border. Further, that service was provided by MCI under agreements with Telmex and ATI, and the ATI-MCI agreements were entered into in Texas. Even assuming the Mexican leg of the calls implicates Mexican interests more than Texas interests, the remaining contacts that ATI's contracts had with Texas, including the choice of law clause which is of some weight, is at least a deciding factor in such a close case.

This makes sense if one looks at the fundamental policies involved, which include Mexico's interest in a domestic telephone monopoly. Mexico would not have a fundamental policy contravened by the application of Texas law in this case. The export of U.S. telecommunication services and even the resale of Mexican services does not contravene Mexico's legitimate monopoly over its domestic lines. Telmex can charge whatever it likes for incoming and outgoing calls on its lines. The resale of the Mexican leg either directly by MCI or indirectly by ATI is only profitable if Telmex allows it to be. If Telmex sets a monopoly price for its initial service, Telmex recoups all potential monopoly revenues from that fee. Telmex may wish to use its monopoly as leverage in order to gain higher revenues from the U.S. leg of calls, but attempts to tie domestic monopoly power into the international market is [sic] not within the scope of the domestic monopoly. As such, it is not a Mexican interest which tips the scale in Mexico's favor.

Texas, on the other hand, would have a fundamental policy contravened by the choice of Mexican law (assuming Mexican law is different on the question of contract validity), namely the ability of Texas companies to make valid export contracts in Texas for the sale of U.S. services.

The remaining contracts and prospective contracts are more obviously governed by Texas law. ATI's contracts with MCI were negotiated and entered into in Texas, between Texas businesses. ATI's potential contracts with AT&T presumably would have been similar. In this case, Mexico's only connection with these contracts is the fact that the contracts involve the use of Mexican lines for a portion of the calls. Given the fact that the parties are in the U.S., the contracts were made in the U.S., and that there is no claim that these contracts were illegal under Mexican law, there seems to be no reason to choose Mexican law to determine the validity of these contracts, despite the fact that part of their subject matter existed in Mexico.

We hold, then that Texas law determines the validity of the contracts and prospective contracts at issue in this case. However, this is still not the end of the analysis.

(c) Foreign Law Which Invalidates Contract Under Texas Law

Under Texas contract law, it is "well settled" that "[a] contract made 'with a view of violating the laws of another country, though not otherwise obnoxious to the laws either of the forum or of the place where the contract is made,' is illegal and 'will not be enforced.'" *See Ralston Purina Co. v. McKendrick*, 850 S.W.2d 629, 639 (Tex. App. - San Antonio 1993, writ denied) (quoting *San Benito Bank & Trust Co. v. Rio Grande Music Co.*, 686 S.W.2d 635, 638 (Tex. App. -- Corpus Christi 1984, writ ref'd n.r.e.)).

This rule has not been analyzed by the Texas appellate courts which have relied on it, and the Texas Supreme Court has not adopted this rule expressly.[2] "To determine state substantive law, we look to final decisions of the state's highest court." *Shanks v. AlliedSignal, Inc.*, 169 F.3d 988, 993 (5th Cir. 1999) (citing *Transcontinental Gas Pipe Line Corp. v. Transportation Ins. Co.*, 953 F.2d 985, 988 (5th Cir. 1992)). "'When there is no ruling by the state's highest court, it is the duty of the federal court to determine as best it can, what the highest court of the state would decide.'" *See id.* (quoting *Transcontinental*, 953 F.2d at 988). Thus, we must make a guess as to how the Texas Supreme Court would interpret this rule. Because the Texas Supreme Court has chosen to follow modern choice of analysis, we proceed with that background assumption. As such, there are two aspects to this rule that must be discussed before it can be applied.

The first aspect is the rule's tacit assumption that foreign law is relevant to the contract in question. For example, there is no reason to suspect Texas courts would deem void a contract between Texans for the sale of cheese in Texas, even if Mexican law purported to make all sales of cheese illegal, even those occurring in Texas. Mexican law would be inapplicable to the contract in question because Mexico has no legitimate interest in the contract. The second aspect to consider is the meaning of "with a view." First, we discuss the rule's assumption that foreign law is relevant.

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[2] "Writ refused, n.r.e." is not the same as "writ refused," in the writ history of Texas appellate cases. Only an unqualified "writ refused" must be treated as on equal footing with other Texas Supreme Court precedent. *See* Texas Jurisprudence, 3d § 145.

Historically, the assumption that the laws of a foreign country were relevant or applicable to a contract was justified if the contract was to be performed in the other country because place of performance or place of contract decided the choice of law question. *See* 6 Williston on Contracts § 1749 (1938). Moreover, "good morals and the obligations of international comity demand denial of judicial sanction to the intentional breach of . . . the general laws of a friendly state." *Id.* Under modern choice of law analysis, however, place of performance or place of contract formation is not always determinative. Furthermore, principles of comity only extend so far. *See Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 75 (3d Cir. 1994) (noting that comity "must yield to domestic policy" and "cannot compel a domestic court to uphold foreign interests at the expense of the public policies of the forum state").

As stated, modern choice of law analysis in Texas applies the law of the forum with the "most significant relationship" to the contract in question. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420-21 (Tex. 1984). Thus, a contract legal in the U.S. may be illegal in Mexico, yet under choice of law analysis, Mexican law might not be chosen to apply. If Mexican law does not apply to determine validity, then to say the contract is illegal in Texas because it violates Mexican law reverts too quickly back to a discarded conclusion, a conclusion rooted in the traditional assumption that Mexican law always has an interest in the contract if some aspect of the contract is illegal under Mexican law.

There are at least two reasons to defer to foreign law, however, even if that law would not be chosen to govern the contract. First, a contract legal in the U.S. and illegal in Mexico may place parties in a dilemma. They can either perform the contract and face Mexican liability (Mexico, after all, may have personal jurisdiction over the parties). On the other hand, the parties can breach the contract, but then face U.S. liability for contract damages. This dilemma, however, is not implicated in tortious interference claims, because by definition, the defendant is not a party to the original contract and thus need not choose between breaking foreign law or facing U.S. liability. A dilemma only exists to the third party if foreign law gives the third party a duty or right to interfere. No duty is alleged in this case with respect to MCI and SBC and the right to interfere (privilege) is addressed below.

A second, but more important, reason to defer to foreign law even if it does not apply to the contract is the mentioned principle of comity, which suggests that the U.S. should respect Mexican law on a kind of "golden rule" basis. The leading Texas case demonstrates this situation although without this explicit reasoning. *See Ralston Purina Co. v. McKendrick*, 850 S.W.2d 629 (Tex.App.-San Antonio, 1993). In *Purina*, a contract to export goods into Mexico was found illegal in Texas because the parties were smugglers who did not have the necessary Mexican licenses. *Id.* at 639. Even if Texas law applied to that contract under a most significant relationship test, the principle of comity would be a strong basis to hold the Texas contract illegal under Texas law, and thus not a basis for a tortious interference claim. If there is no dilemma and there is no basis for comity, however, the old rule makes no sense under modern choice of law analysis which already takes into account the interests of the various fora. To allow foreign law to jump back in and change the conclusion circumvents the principles behind the original choice of law.

The second aspect of the rule that must be analyzed is what "with a view" means. The language implies the existence of an intention on the part of at least one of the parties to violate foreign law. It is unclear whether the rule requires both parties to have illegal intentions, as it has been remarked that one party's mere knowledge of the other's illegal intentions is insufficient to void a contract. *See International Aircraft Sales, Inc. v. Betancourt*, 582 S.W.2d 632, 635 (Tex.Civ.App.-Corpus Christi May 31, 1979, writ refused n.r.e.). If intention did not matter, the rule could merely state that contracts which violate foreign law are illegal. The policy behind this part of the rule appears to be that it is against the public policy of the domestic forum to encourage willful attempts to break foreign law. Given these considerations, however, it makes no sense to apply the rule if there is no intention of either party to violate foreign law. More importantly, however, if foreign law is sufficiently unclear as to the legality of certain actions, then it is unreasonable to say the parties entered the contract with a view to violate anything.

Because the Texas Supreme Court has not addressed these issues, we consider how the court might decide the first issue, and we decide that when a contract governed by Texas law violates the laws of a foreign country, that violation does not void the contract for purposes of tortious interference claims if the foreign policies at issue do not demand comity. In this case, if Mexican law banned the import of U.S. switching services or the incidental resale of Mexican capacity by a non-provider, it would be a policy designed to increase the monopoly power of a domestic company outside the territorial boundaries of that country. Such policies do not demand comity. It would not be the case of a country banning an import which is arguably injurious to the health or morals of its citizens, such as toxic waste or pornography. Instead, if ATI's activities were illegal in Mexico, then it would be an example of a country banning the import of a competitive service for which no legitimate monopoly exists. While it is fine for a country to take a protectionist position, the legality of U.S. contracts need not turn on it.

Because there is no "dilemma" alleged in the current case with respect to third parties being forced to choose between U.S. contract damages and Mexican liability, we do not decide the effect of such a dilemma on the rule.

Thus, even if Mexican law prohibited the resale of already resold telecommunications services or prohibited the importing of U.S. telecommunications services, these facts do not serve as a defense to a claim of tortious interference with such contracts in situations when the alleged tortfeasor is not forced to choose between violating foreign law or suffering U.S. liability, when Texas law otherwise governs the underlying contracts and torts.[3]

An alternative basis to decide this issue, of course, would be that contracts entered "with a view" to violate foreign law are not void for the purposes of tortious interference claim if neither party to the contract had illegal intentions. An illegal intention is not shown in this case, at least for the purposes of summary judgment. As shown below, Mexican law at the time was sufficiently unclear and capable of multiple interpretations as to what was or was not legal. Such difficulty in interpreting foreign law makes it unreasonable to conclude any contract was entered with a view to violate foreign law. The fact that ATI attempted to get a permit "just in case," does not prevent them from successfully arguing that their service was legal and they believed it was legal. While the content of foreign law is a legal question, the question of ATI's intention is not, and there is sufficient evidence to permit a jury to conclude ATI was acting with the view that their services were legal; as such, summary judgment against ATI on the tortious interference claims would be improper unless ATI's activities were illegal under U.S. law or subject to another defense, as discussed below.

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[3] For the purposes of this analysis, it is assumed that the SCT's refusal of a permit to ATI suffices to show exclusion from the Mexican market. This assumption is made without deciding that such a refusal shows a permit was legally required, but only that one was not readily available. Had one been easily available and a mere "formality," then it would not make sense to characterize Mexican law as protectionist.

2. Validity Under U.S. Law

It remains to determine whether ATI's contracts and services were illegal with respect to U.S. law. The defendants assert that ATI's activities were contrary to 47 U.S.C. § 214, which requires authorization before a carrier "shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line." ATI, however, merely provided a service that connected different lines and did not itself construct any new lines. Section 214 applies only to the construction of facilities and does not prevent carriers from offering new services. *See MCI Telecommunications Corp. v. FCC*, 182 U.S. App. D.C. 367, 561 F.2d 365 (D.C. Cir. 1977).

Furthermore, even with respect to call-back, a practice truly hostile to a legitimate domestic monopoly, the FCC decided in 1995 that even call-back did not violate U.S. or international telecommunications law and only prohibited the service on comity grounds where "expressly prohibited" in the foreign country. *In re VIA USA, Ltd.*, 10 FCC Rcd 9540 PP 50-51 (1995). Thus, during 1993 and 1994, there was no basis to deem call-back, let alone reorigination, illegal under U.S. law.

3. Other Tortious Interference Defenses

The defendants also support the entry of summary judgment in their favor on a number of alternative legal grounds, including federal preemption, the terms of MCI's tariff, Texas tortious interference doctrine, and privilege.

(a) Privilege

First, the defendants assert that they are protected by the common law defense of privilege. The Texas Supreme Court has explained this defense thus:

> Under the defense of legal justification or excuse, one is privileged to interfere with another's contractual relations (1) if it is done in a bona fide exercise of his own rights, or (2) if he has an equal or superior right in the subject matter to that of the other party. One may be privileged to assert a claim even though that claim may be doubtful, so long as it asserted a colorable legal right. However, the defense of legal justification or excuse only protects good faith assertions of legal rights. *Victoria Bank & Trust v. Brady,* 811 S.W.2d 931, 939-40 (Tex. 1991).

The Restatement, cited as authority in *Victoria Bank,* explains that the defense "protects the actor only when (1) he has a legally protected interest, and (2) in good faith asserts or threatens to protect it, and (3) the threat is to protect it by appropriate means." Restatement (Second) of Torts § 773.

MCI did have a legal right to halt MCI's service with ATI if Telmex threatened to cut off MCI's service. That right was based on the MCI's contract with ATI. But ATI's tortious interference claim is not based on MCI halting ATI's service; it is based on MCI giving away ATI's confidential information. As such, ATI's claims concern actions which cannot be traced to legal rights stemming from a contract or domestic or foreign law. If MCI "disclosed the business or application(s) of [its] customers," it was in violation of U.S. law, according to MCI's correspondence with Telmex.[4] MCI maintains that it was trying to protect its interest in its contract with Telmex, and to ensure that AT&T was not receiving illegal preferential treatment from Telmex. The problem with MCI's argument is that the tortious interference was allegedly accomplished through improper release of confidential information. Release of nonconfidential information may be a basis for privilege. *See* Restatement (Second) of Torts § 773 illus. 1. The release of confidential information, however, is not an "appropriate means" to protect other interests.

If Telmex cut off ATI's service as alleged, it might have been against Mexican law, but whether or not it was, Telmex's privilege is not before us, except insofar as SBC attempts to claim it by virtue of SBC's part ownership of Telmex. SBC maintains that it was protecting the interests of its affiliated company Telmex. However, SBC is only a 10% owner of Telmex and there is evidence which a factfinder could find that SBC's actions in helping Telmex and MCI shut down ATI were as much for SBC's benefit as its own entity rather than as an agent of Telmex, given that SBC intended to independently enter ATI's market. Because there is not a completely obvious "unity of interest" between SBC and Telmex, summary judgment on SBC's privilege defense is inappropriate. Thus, there is no basis on which to rest a defense of privilege for SBC and MCI at the summary judgment stage.

(b) Preemption

MCI argues that its filed tariff preempts ATI's Texas tort claims because of the federal "filed-rate doctrine." Many cases speak about federal preemption of state claims when there are filed tariffs. *See, e.g., Marcus v. AT & T Corp.*, 938 F. Supp. 1158 (S.D.N.Y. Aug 21, 1996), *aff'd*, 138 F.3d 46 (2d

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[4] Neither side cites the regulation that such disclosure violates; however, no party disputes that such disclosure is illegal without permission.

Cir. 1998) (holding the following claims preempted: deceptive acts and practices, false advertising, fraud and deceit, negligent misrepresentation, breach of warranty, and unjust enrichment by failing to disclose that customers were billed per minute rounded up to the next higher full minute for long distance services). The leading and controlling case in this area for our purposes is *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998), in which the Supreme Court expounded on the filed-rate doctrine.

Central Telephone, a bulk reseller of long distance services purchased from AT&T, sued AT&T, alleging breach-of-contract and tortious interference claims. Under the filed-rate doctrine, federal law preempts claims concerning the price at which service is to be offered, and the Supreme Court ruled that it also preempts claims concerning the services that are offered. *See* 118 S. Ct. at 1962-64. The Court thus found the breach-of-contract claims preempted. The Court also found the tortious interference claim preempted, but only because that claim was "wholly derivative of the contract claim for additional and better services." *Id.* at 1964. The tortious interference claim alleged that AT&T's refusal to provide certain types of service led to interference of Central Telephone's contracts with its customers. *See id.* at 1964-65. It was thus not protected by the saving clause of the Communications Act. *See id.* at 1965 ("A claim for services that constitute unlawful preferences or that directly conflict with the tariff—the basis for both the tort and contract claims here—cannot be 'saved' under § 414.").

ATI's tortious interference claims are different. It does not allege that MCI stopped providing service, resulting in ATI being unable to meet customer demand. Rather, ATI alleges that MCI released confidential information, first to Telmex and then to AT&T. This information ultimately led those parties to deny service to ATI. This claim is not derivative of a contract claim. It does not concern the provision of services which are covered by the filed tariff, but rather it concerns illegal actions outside the scope of the tariff and not derivative of any phone services. Therefore, the filed rate doctrine does not preempt ATI's tortious interference claims.

(c) Filed Tariff

MCI argues that its filed tariff precludes liability because there is a contractual provision stating that MCI may halt service if a situation arose involving threats from the third party partner. This only goes to whether MCI breached its contract with ATI, not whether MCI breached duties imposed outside of the contract, as alleged by ATI, and thus this argument fails as a defense to tortious interference. The right to halt one contract does not grant the right to interfere with another by any conceivable means. MCI may well have been entitled to cut off service to ATI once Telmex threatened it with cutting off international 800 service. But the provision did not authorize MCI to respond to such threats by helping Telmex cut off ATI, or by preventing ATI from having a contractual relationship with AT&T.

(d) Breach of Contract

MCI argues that ATI's tortious interference claims are nothing more than claims that MCI breached its contract with ATI, and as such are precluded from serving as the basis of tortious interference claims. Under Texas law, "the general law is that where a defendant's conduct breaches an agreement between the parties and does not breach an affirmative duty imposed outside the contract, the plaintiff ordinarily may not recover on a tort claim if the damages are economic losses to the subject matter of the contract." *National Union Fire Ins. Co. v. Care Flight Air Ambulance Serv., Inc.*, 18 F.3d 323, 327 (5th Cir. 1994). However, this does not mean tort damages cannot be measured by economic losses from the contract. *See American National Petroleum Co. v. Transcontinental Gas Pipeline Corp.*, 798 S.W.2d 274 (Tex. 1990) (allowing recovery for exemplary damages for tortious interference claim when damages from the tort were the same as economic damages from breach of contract). Furthermore, it is obvious that ATI's claims are not breach of contract claims, but rather are allegations that MCI breached duties imposed affirmatively outside the context of the ATI-MCI contracts. Thus, this defense fails as well.

(e) No Issue of Material Fact

Finally, MCI argues that there is no evidence that MCI actually gave ATI's numbers to Telmex. There is at least a material issue as to this fact, however, and summary judgment is inappropriate. The fact that MCI and MCI's employees say they did not give away the numbers flies square in the face of the memoranda and communications discovered by ATI which suggest that MCI planned to and did do just that.

C. Federal and State Antitrust Claims

1. Prima Facie Showing

The district court dismissed ATI's federal and state antitrust claims because the court failed to find a relevant U.S. market. In order to support an antitrust claim, there must be actions which have a reasonably foreseeable effect in a defined U.S. market. *See* 15 U.S.C. § 6a; *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796, 125 L. Ed. 2d 612, 113 S. Ct. 2891 (1993) (allowing Sherman act recovery for foreign conduct that produces "some substantial effect in the United States").

ATI asserts that there was a direct and substantial effect on trade or commerce, and second that it was engaged in export trade. The substantial effect that ATI identifies is that its own business, as well as that of other companies, failed, "resulting in an inability to sell its U.S. telephone switching services to all Mexican customers." The alleged actions by Telmex and the other defendants were aimed at shutting down this market. It is clear that the U.S. export market for reorigination services was a definite and sizable export market, and the failure of these 80 businesses is clearly an effect on export trade from the United States. The market is significant, with ATI's annual revenues alone reaching $3 million/year at the time the events occurred. Under 15 U.S.C. § 6a, the antitrust laws do "not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless . . . such conduct has a direct, substantial, and reasonably foreseeable effect . . . on trade or commerce which is not trade or commerce with foreign nations, or on import trade or . . . export trade . . . with foreign nations." By showing a significant effect on a U.S. export market, ATI meets the export trade exception.[5]

For the purposes of the antitrust inquiry, however, it matters whether the importation of these U.S. services was legal under Mexican law. If the importation of these services was illegal, there is no legal export market to Mexico. If there is no legal U.S. export market to Mexico and the only U.S. export market affected is the Mexican market, then there is no antitrust injury. *Cf. Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) ("American antitrust laws do not regulate the competitive conditions of other nations' economies."). In other words, foreign countries may make laws or create monopolies that effectively and completely exclude U.S. import competition. That does not then mean that U.S. companies can enter the market anyway and make antitrust claims when things do not work out. Even in the U.S., the existence of a legitimate government granted monopoly precludes claims of antitrust violation when a plaintiff wants to compete in the regulated market. *See Almeda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343 (5th Cir. 1980).

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[5] This is not to say that the factfinder could not ultimately conclude that the relevant market for antitrust liability is the Mexican long-distance market. Our characterization of Telmex's business and our determination that the actions of Telmex and the other defendants had a "direct, substantial, and reasonably foreseeable effect" on the U.S. export market for switching services does not preclude the factfinder from making an independent determination of the relevant market for the purposes of antitrust liability. *Cf. Doctor's Hospital of Jefferson, Inc. v. Southeast Medical Alliance, Inc.*, 123 F.3d 301, 311 (5th Cir. 1997).

This is not inconsistent with our holding that contracts for reorigination services may still serve as the basis for tortious interference claims. For the purposes of antitrust law, the threshold choice of law determination always validates a foreign government's right to determine whether outsiders can compete. As we have held, however, this choice of law is not mandated by the law of tortious interference. Admittedly, this is a "conflict" within U.S. law, but not one we need to resolve.

ATI challenges the district court's award of summary judgment against it on its antitrust claims against SBC and MCI. Because we find that ATI's services were legal under the law of Mexico at the relevant time, anticompetitive means of stopping such service may violate U.S. antitrust laws.

2. Legality of ATI's Operations Under Mexican Law

The content of foreign law is a question of law and is subject to de novo review. *See* Fed. R. Civ. P. 44.1; *Perez & Compania v. M/V Mexico I*, 826 F.2d 1449 (5th Cir. 1997). "The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43." Fed. R. Civ. P. 44.1. Under this rule, expert testimony accompanied by extracts from foreign legal material is the basic method by which foreign law is determined. *Republic* *of Turkey v. OKS Partners*, 146 F.R.D. 24, 27 (D. Mass. 1993). It is not, however, "an invariable necessity in establishing foreign law, and indeed, federal judges may reject even the uncontradicted conclusions of an expert witness and reach their own decisions on the basis of independent examination of foreign legal authorities." *Curtis v. Beatrice Foods Co.*, 481 F. Supp. 1275, 1285 (S.D.N.Y.), *aff'd mem.*, 633 F.2d 203 (2d Cir. 1980). Likewise, differences of opinion among experts on the content, applicability, or interpretation of foreign law do not create a genuine issue as to any material fact under Rule 56. *Banco de Credito Indus., S.A. v. Tesoreria General*, 990 F.2d 827, 838 (5th Cir. 1993). In general, summary judgment is appropriate to determine the content of foreign law. *See* 9 Wright & Miller, Federal Practice and Procedure Civ. 2d § 2444.

At issue is the legality of ATI's business under Mexico law. Under Mexican law at the time in question, a government concession or permit was required in order to provide telecommunications services in Mexico. It is undisputed that ATI had no permit or concession from the Mexican government. What is disputed is whether ATI's business was within the scope of this law. ATI makes the argument that at the time in question, the relevant regulatory provisions envisioned the concession requirement to only apply to entities who were providers of telecommunications services in that they owned, installed, operated, and exploited telecommunications infrastructure in Mexico, with emphasis on the "and." The defendants argue that a permit is required to install, operate, "or" exploit telecommunications infrastructure in Mexico, with emphasis on the "or," and because ATI exploited the infrastructure, they needed a permit. The defendants also argue that all "resellers" needed permits.

ATI rests primarily on the deposition of Miguel Orrico Alarcon, who was head of SCT legal counsel for 33 years.

Orrico, who is said to have drafted, applied, interpreted and enforced the provisions at issue, explained that Mexico's statutory definitions of a "provider" of telecommunications service is limited to those that install, operate, and exploit the network. Because ATI did not install a network, and because special significance is attached to the conjunctive language of the statute, ATI was not a provider and therefore was not regulated under these provisions. Mexican law changed subsequent to the time at issue in this case, and now resellers explicitly are required to obtain permits.

The defendants focus on Moncayo's letter and on the Secretary of Communications and Transportation's Official Circular Letter 119-1900. Moncayo's letter is of little value, because it directly discusses only "call-back" services, which ATI's was not. The Official Circular, however, condemns such services in addition to "other similar or equivalent procedures with the same purpose." The Circular concludes that such services are "rendered outside the legal provisions established by the Federal Law on Telecommunications, in view of the exclusive nature of the right granted to Telefonos de Mexico until August 1996 for rendering basic national and international long distance service."

The defendants maintain that the Official Circular is entitled to deference by this court as an agency's interpretation of the laws which it administers and enforces, citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). ATI counters that the official circulars in fact have no legal effect, and that in Mexico, only federal courts have the power to issue resolutions determining the legality or illegality of acts. Moreover, ATI emphasizes, only the General Bureau of Judicial Matters has the sole power to "establish and systematize" the legal criteria concerning the application of legal and regulatory provisions, not Mr. Moncayo's office.

Recognizing the difficulty of interpreting foreign law, courts may defer to foreign government interpretations. The Seventh Circuit reached this conclusion in deferring to an administrative agency in France, a civil law country. *See In re Oil Spill by the Amoco Cadiz,* 954 F.2d 1279, 1312 (7th Cir. 1992) ("A court of the United States owes deference to the construction France places upon its domestic law . . . . Giving the conclusions of a sovereign nation less respect than those of [a U.S.] administrative agency is unacceptable.").

In *Amoco Cadiz,* the court was faced with conflicting interpretations of French law. The court noted that had the litigants been private parties, it would have had to resolve the conflicts. *See id.* at 1312. Because the Republic of France was before the court, however, the Seventh Circuit accepted its interpretation of the law. *See id.* The Republic of Mexico is not a litigant before this court and neither is the SCT. And while the evidence shows that the SCT was empowered to enforce Mexican law, it does not persuasively show that the SCT was empowered to interpret Mexican law. The fact that U.S. courts routinely give deference to U.S. agencies empowered to interpret U.S. law and U.S. courts may give deference to foreign governments before the court does not entail that U.S. courts must give deference to all agency determinations made by all foreign agencies not before the court. More importantly, the most relevant official circular at issue is dated 1996, after the new laws went into effect; thus, it is unclear whether the SCT position was that such activities were currently illegal or had always been illegal. For these reasons, we do not feel compelled to credit the SCT's determinations without analysis.

The defendants also argue that the relevant regulations required a permit to be a reseller. The statute in question, however is not without question. Our English translation of Article 75 of the Telecommunications Rulings of Mexico reads as follows:

> The exploitation of the telecommunications network given in concession must be carried out directly by its holder and its commercialization may be made through agents in accordance with the provisions approved by the Ministry.

We read this to mean that the direct operation of the network must be accomplished by the actual provider, and that the provider may designate others to commercialize the network. It does not say commercialization "must" be made through those channels, however. Furthermore, this court has not been apprised of the content of any "Ministry provisions," and the defendants have not identified any regulation in place at the time which defines or regulates "resale" or explicitly requires a permit for anything except provision, which we have already decided ATI was not doing. Instead, we find convincing the argument that before the new laws took effect, only the direct provision of telecommunications services required a concession from the Mexican government, for several reasons.

First, because ATI's method was novel, it is unrealistic to read the older Mexican law as covering the service. The new laws explicitly regulate resale and pointedly are not retroactive; this is at least some evidence supporting the notion that permits were not previously envisioned.

Second, Mexico's concession to Telmex specifically authorized Telmex to resell any excess capacity, even before 1996, although it did not require it to do so. Thus, what appears to be the case is that Telmex resold capacity to MCI not realizing the boon it would be for others to use that capacity with additional U.S. services attached.

Third, a conclusion that any Mexican resale is covered by the older, vague provisions would entail that every U.S. or Mexican business with a toll free number would have been required to have a permit because they "resell" Mexican phone service as much as ATI did whenever they charge the cost of call-back to the caller through their service fees. The fact that laws could try to distinguish between resellers "primarily" engaged in resale versus those "incidentally" engaged in resale does not change the fact that the relevant laws are not so explicit.

Fourth, to say that any Mexican resale required a permit would have invalidated MCI's contracts with Telmex insofar as neither MCI nor Telmex has indicated that MCI had a permit. While it is not necessary for either defendant to show its own conformity with Mexican law, it adds skepticism to their argument that a permit was required or even envisioned and lends credibility to the view that what happened in this case is that Telmex made a bad bargain with MCI and wanted to get out of it. Telmex's contract with MCI might have purported to restrict MCI's subsequent use of the lines, but ostensibly did not. Our view is further supported by the fact that the SCT did nothing to instigate enforcement proceedings against any business during the relevant time period. The evidence indicates that by law the SCT was required to institute such enforcement if there was evidence of illegality. Instead, the precatory language of even the 1993 SCT letters, stating that the SCT would be "grateful" if MCI suspended the service of its customers, suggests that even to the SCT the services in question were not clearly illegal.

Fifth, because Telmex has no legitimate interest in tying a monopoly over domestic lines to the use of lines outside of Mexico, we will not construe Mexican law as requiring a permit for the importing of U.S. switching service unless explicitly authorized. No one contends that the relevant laws are this explicit, however. Furthermore, this interpretation conforms with the FCC's extension of comity to foreign law when foreign law is unambiguous.

For all of these reasons, we find ATI's activity in Mexico to be legal during the time in question. Thus it was improper to dismiss ATI's state and federal antitrust claims against SBC and MCI. It is argued that this application of the export exception circumvents the principle that antitrust laws do not extend to other nations' competitive rules. *See Matsushita Elec. Indus. Co. v. Zenith Radio,* 475 U.S. 574, 582, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). This would only be true if the legality of the export-import business were not taken into consideration, which it has been. The fact that we find ATI's business to be legal in Mexico is not irreconcilable with Mexican policy designed to protect Telmex from domestic competition, since such a policy is not furthered by banning the import of U.S. reorigination services. Furthermore, Mexican law could have explicitly protected Telmex from even international competition by making it illegal to import U.S. services, which would have been a basis to defeat these antitrust claims.

D. Personal Jurisdiction over Telmex

A federal district court has personal jurisdiction over a nonresident defendant to the same extent as a state court in the state in which the district court is located. *See, e.g., Bullion v. Gillespie,* 895 F.2d 213, 215 (5th Cir. 1990). The Texas long-arm statute extends to the limits of the Due Process Clause of the Constitution. *See* Tex. Civ. Prac. & Rem. Code Ann. § 17.042. The exercise of personal jurisdiction thus can be maintained if the nonresident defendant has purposefully availed itself of the benefits and protections of the forum state by establishing "minimum contacts" with the forum state, *see, e.g., International Shoe Co. v. Washington,* 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945), and if the exercise of jurisdiction over the nonresident defendant does not offend "traditional notions of fair play and substantial justice." *Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102, 113, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987).

Telmex claims both that it did not have sufficient contacts with the forum state, and that the exercise of jurisdiction over it would be improper because the procedural and substantive policies of Mexico would be affected. *Asahi* noted that "great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Id.* at 115 (internal quotation marks omitted). *Asahi,* however, was concerned with "the unique burdens placed upon one who must defend oneself in a foreign legal system." *Id.* at 114. For Telmex, a company that indisputably has engaged in numerous business dealings in the United States, these concerns are *de minimis,* and even if Mexican policy is relevant on the merits, it is not relevant to the initial determination of personal jurisdiction. If Telmex has broken U.S. law, then requiring Telmex to answer for that would be "fair play."

Thus, there was no personal jurisdiction over Telmex only if Telmex did not have sufficient contacts with Texas and the United States. Minimum contacts can be established either through contacts giving rise to general jurisdiction, or those giving rise to specific jurisdiction. We shall consider these as well as ATI's alternative claim that jurisdiction is authorized under a special provision of the Clayton Act.

1. General Jurisdiction

The lower court dismissed the claims against Telmex on personal jurisdiction without an evidentiary hearing. In such instances, the plaintiff satisfies his burden by presenting a prima facie showing of jurisdiction. *See Felch v. Transportes Lar-Mex, S.A. de C.V.,* 92 F.3d 320, 326 (5th Cir. 1996). Conflicting evidence must be resolved in favor of the plaintiff. *See id.* (quoting *Bullion v. Gillespie,* 895 F.2d 213, 217 (5th Cir. 1990)).

General jurisdiction can be assessed by evaluating contacts of the defendant with the forum over a reasonable number of years, up to the date the suit was filed. *See Metropolitan Life Insurance Co. v. Robertson CECO Corp.,* 84 F.3d 560, 569 (2d Cir. 1996). Telmex's contacts with Texas over the time period from 1990 to 1996 were numerous; the major ones are highlighted here. Up until 1990, Telmex leased telephone circuits between Arizona and Texas. Telmex's current lines interconnect with Texas at the border in McAllen and El Paso. Telmex leased real property in Texas in 1995 and paid taxes to Texas that same year. Telmex contracted to warehouse 75,000 telephone poles in Laredo around 1990-1991. Telmex had correspondent agreements with a number of US carriers. Settlement revenues from these agreements totaled approximately $1 billion a year in 1994-1995. The total revenues derived from Texas residents totaled millions of dollars a month. Telmex also solicited ads for yellow page ads in border cities of U.S., although it is unclear exactly where. Additionally, SBC is alleged to be a Texas contact of Telmex, since SBC owns a portion of a controlling interest in Telmex and thus exerts some control over Telmex.[6]

The district court examined each Telmex contact and in isolation from the others, rather than examining the contacts "in toto" as required. *See Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 779 (5th Cir. 1986). In other words, even if a number of different contacts are independent of one another, if they occur with such frequency that the contacts in general are "continuous and systematic," there is general jurisdiction.

The question, then, is whether Telmex's contacts with Texas demonstrate a business presence in Texas sufficient to confer general jurisdiction. The mere renting or ownership of property in a forum is not enough when that property is not used to conduct business in the forum. *Cf. Shaffer v. Heitner*, 433 U.S. 186, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977). And while Telmex's other contacts may be continuous and systematic contacts which constitute doing business with Texas, Telmex has virtually no contacts which constitute doing business in Texas. Primarily, Telmex interconnects its Mexican lines with American lines, enabling long distance communication. The money U.S. companies pay Telmex is for service on the Mexican leg of the call; the money the U.S. carriers receive is for the U.S. leg of a call. As such, Mexican and U.S. telecommunications companies do business with each other in these situations, but neither is doing business in the other country for jurisdictional purposes.

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[6] A number of other contacts are also put forward, mostly involving Telmex paying for services that were provided by corporations in Texas or the U.S. Such services included consulting and finance services. To the degree these contacts involve Texas, they add little to the issue; to the degree they are with other states, they are irrelevant at this juncture. Other contacts, such as Telmex being listed on the NYSE, or designating a NY agent for service of process are also not very informative.

The lines Telmex leased from Texas to Arizona also were for the purpose of connecting two points in Mexico and do not constitute doing business in Texas. The fact that SBC owns a portion of a controlling interest in Telmex also adds little to the mix. SBC's 10% interest is not a controlling interest, and typically, the corporate independence of companies defeats the assertion of jurisdiction over one by using contacts with the other. *See Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1159 (5th Cir. 1983) ("Generally, our cases demand proof of control by the parent over the internal business operations and affairs of the subsidiary in order to fuse the two for jurisdictional purposes.").

The one contact that could constitute doing business in Texas would be the yellow page ads. However, the evidence on the yellow page ads consists of nothing more than a comment that Telmex solicited yellow page ads in border cities in the U.S. without naming which cities, when this occurred, whether such ads actually were actually placed, or for how long. Without more, such evidence does not help establish continuous and systematic contacts.

It is alleged that MCI sells regular phone service, international 800 service, and private line service for

Telmex in Texas. This would imply a principal/agent relationship from which jurisdiction might arise. There is no evidence, however, that the provision of service by MCI was on behalf of Telmex but instead it appears to be in the nature of the resale of capacity in Mexico by MCI and the independent provision of capacity in the U.S. by MCI, as explained above with respect to the general interconnection agreements.

The strongest argument for general jurisdiction is that Telmex had arrangements with American carriers to accept telephone signals from Texas, and in order to serve this purpose, Telmex's telecommunications lines crossed into Texas, terminating across the border. The termination of Telmex's telephone lines in Texas allows for continuous and systematic transfer of calls. However, despite the apparent force of the argument that such a contact demonstrates a presence in Texas for business purposes, we are bound by *Applewhite v. Metro Aviation, Inc.*, 875 F.2d 491 (5th Cir. 1989), in which such interconnections, even though crossing the border into a forum, were held insufficient to confer general jurisdiction under the Due Process Clause.

In sum, the totality of the contacts suggests that Telmex conducted a great deal of business with Texas, but virtually none in Texas, as such general jurisdiction cannot be shown, even on a prima facie basis.

2. Clayton Act Jurisdiction

Because we find that ATI has shown potential U.S. antitrust injury, jurisdiction over Telmex may be obtainable based on nationwide contacts rather than just Texas contacts under the jurisdictional provision of the Clayton Act, 15 U.S.C. § 22. This provision allows for jurisdiction over any federal antitrust suit in any district in which a defendant transacts business, and provides that "all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." When jurisdiction is invoked under the Clayton Act, the court examines the defendant's contacts with the United States as a whole to determine whether the requirements of due process have been met. *See Go Video, Inc. v. Akai Electric Co., Ltd.*, 885 F.2d 1406 (9th Cir. 1989).

However, while there may be some additional evidence of Telmex doing business with the U.S., there is no evidence qualitatively difference on the subject of doing business in the U.S. for what we deem to be a relevant time period from 1990 to 1996. Thus, Clayton Act personal jurisdiction over the antitrust claims is also unavailable.

3. Specific Jurisdiction

ATI maintains that specific jurisdiction over Telmex arises because Telmex "purposefully directed its activities to residents of Texas (ATI and over 80 other resellers)." As ATI recognizes, specific jurisdiction over a nonresident exists when the defendant "purposefully avails" itself of the privilege of conducting activities in the forum, and the plaintiff's cause of action arises out of or relates to that act. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985). By working through SBC and MCI to obtain the numbers of resellers, ATI maintains, Telmex purposefully availed itself of the forum.

While Telmex did not conduct much business in Texas, it conducted a high volume of business with Texas and Texas corporations. It was this business with which Telmex was concerned when Telmex allegedly canceled ATI's numbers. Such actions, if done without a legal right, may amount to violation of U.S. law. The issue of whether they were legally privileged, however, is not before us, and such a defense would not defeat personal jurisdiction. Thus, if the allegations against Telmex are true, then Telmex may have violated U.S. antitrust law by harming a Texas business through the willful cancellation of a necessary portion of that business's service. Such actions would have reasonably foreseeable consequences in Texas.

It is no use to say that ATI's location in Texas was "fortuitous." ATI had to be located somewhere and Telmex knew where that was and directed its actions toward Texas by canceling phone service linked to Texas. Telmex's lines ran right up and into Texas for the express purpose of serving Texas residents with Mexican phone service, a service for which it received millions of dollars a month in revenue. The allegation that Telmex shut down these lines in order to harm a Texas business whose services were legal in Mexico suffices to confer personal jurisdiction over Telmex for the injuries suffered in Texas. The equivalent result would hold if an electric company sent an electric spike through its lines, damaging computers on the other end, even if that company's lines did not carry the spike all of the way to its destination.

By conducting a large volume of business with Texas through contracts carefully drafted to avoid subjecting Telmex to general personal jurisdiction in Texas, Telmex may have avoided doing business in Texas, but it made sufficient contacts with Texas and received sufficient benefits that personal jurisdiction in Texas is proper to answer for the consequences of the actions it allegedly took, directed toward Texas, to protect its business with Texas.

E. Discovery

ATI complains discovery was improperly limited. The district court stayed discovery on everything except jurisdictional issues and never lifted the stay. ATI contends that it was reversible error for the district court to grant summary judgment for SBC and MCI on all of ATI's causes of action without allowing discovery on substantive issues.

ATI points to SBC's assertion of the Copperweld doctrine, which requires a factual determination as to whether a monopolistic conspiracy occurred between economic competitors. This doctrine was asserted for the first time in SBC's motion for summary judgment. ATI complains that it was unable to investigate the relationship between SBC and Telmex for the purpose of this doctrine. ATI also complains it was unable to investigate the anticompetitive effect in the United States of the defendants' conduct. In particular, ATI points to the fact that the district court ruled against ATI on the issue of relevant market, without affording ATI the opportunity to pursue the issue through discovery. The issue of relevant market is a fact question. *See, e.g., C.G. Services, Inc. v. Control Data Corp.*, 759 F.2d 1241 (5th Cir. 1985); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480 (5th Cir. 1984).

ATI has waived the issue of inadequate discovery with respect to SBC. Under Federal Rule of Civil Procedure 56(f), the appropriate way to raise the issue is for the party opposing the motion for summary judgment to file a motion for a continuance with an attached affidavit stating why the party cannot present by affidavit facts essential to justify the party's opposition. ATI did not do this with respect to SBC.

MCI made such a motion, but the district court denied it. To obtain a continuance of a motion for summary judgment, a party must "specifically explain both why it is currently unable to present evidence creating a genuine issue of fact and how a continuance would enable the party to present such evidence." *Liquid Drill, Inc. v. U.S. Turnkey Exploration, Inc.*, 48 F.3d 927, 930 (5th Cir. 1995). The non-moving party may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts in opposition to summary judgment. *See Daboub v. Gibbons*, 42 F.3d 285, 288 (5th Cir. 1995). If it appears that further discovery will not provide evidence creating a genuine issue of material fact, the district court may grant summary judgment. *See Resolution Trust Corp. v. Marshall*, 939 F.2d 274, 278 (5th Cir. 1991).

ATI failed to specify its intended discovery or how such discovery would assist it in opposing summary judgment in favor of MCI. ATI failed to identify who could provide information relevant to the issues other than witnesses who had already been deposed one or more times before.

When a party is not given a full and fair opportunity to discover information essential to its opposition to summary judgment, the limitation on discovery is reversible error. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). ATI, however, has not persuasively indicated that it was deprived of any relevant information with respect to MCI. *Cf. RTC v. Marshall*, 939 F.2d 274, 278 (5th Cir. 1991) (requiring the nonmovant to show how additional discovery would lead to unresolved issues of fact). For these reasons, it was proper for the district court to deny additional discovery.

IV.

For the forgoing reasons, we REVERSE the district court's grant of summary judgment to MCI and SBC on the substantive issues in this case, we REVERSE the dismissal of Telmex on personal jurisdiction, and we REVERSE the denial of partial summary judgment to ATI on the issue of the lawfulness of its activities in Mexico. We REMAND this case to the district court for additional proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT
W.D. TEXAS, SAN ANTONIO DIVISION

No. SA-96-CA-1064

ACCESS TELECOM, INC.,
PLAINTIFF,
v.
MCI TELECOMMUNICATIONS CORPORATION, ET AL.,
DEFENDANTS.

August 5, 1998

ORDER

SUTTLE, Senior United States District Judge.

The matter before the Court is the Motion for Summary Judgment filed by defendants MCI Telecommunications Corporation and MCI International, Inc. ("MCI") on July 29, 1997,[1] Plaintiff's Response filed on August 12, 1997,[2] ATI's Supplement to Plaintiff's Motion for Summary Judgment and Response to Defendant MCI Telecommunication Corporation's and MCI International, Inc.'s Motion for Summary Judgment filed on August 13, 1997[3] and Supplement to Plaintiff's Response to the Motion for

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[1] Docket Entry No. 80.

[2] Docket Entry No. 92.

[3] Docket Entry No. 94.

Summary Judgment of MCI filed on August 21, 1997,[4] MCI's reply to ATI's response filed on August 26, 1997,[5] the letter brief submitted by MCI on June 29, 1998, and the letter in response submitted by ATI on July 2, 1998. Having reviewed these documents, the supporting exhibits and affidavits attached thereto and the relevant case law, the Court enters the following order.

I. Factual Background

ATI began operating in June 1993. One of the businesses it engaged in was the reorigination of international long distance calls from its customers in Mexico to parties located in the United States at rates cheaper than the customer would pay if it used the long distance services of Telefonos de Mexico ("Telmex"). MCI is a provider of interstate and international telecommunications services to both commercial and residential users. On June 30, 1993, ATI executed a letter of authorization selecting MCI as its long distance carrier and provider of 800 numbers. On July 7, 1993, ATI executed an MCI Global Vision Enrollment Form and Agreement. On November 30, 1993, ATI executed an MCI Global Vision Enrollment Form replacing the July 7, 1993 agreement. The November 30, 1993 enrollment form incorporated by reference the terms and conditions of MCI Tariff FCC No. 1 ("the Tariff"). On August 6, 1994, ATI executed an MCI Vision VIP Enrollment Form and Agreement replacing the November 30, 1993 Agreement. The August 6, 1994 Enrollment Agreement also incorporated by reference the Tariff. MCI International ("MCI") is a participating carrier under the Tariff. Beginning in July 1994, Telmex began terminating ATI's I-800 services, claiming that ATI's I-800 service was in violation of Mexican law.

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[4] Docket Entry No. 96.

[5] Docket Entry No. 107.

ATI filed the instant lawsuit against MCI and the other defendants in the 734th Judicial District Court, Bexar County, Texas. ATI alleges the following seven causes of action against MCI: (1) breach of contract; (2) negligent misrepresentation; (3) promissory estoppel; (4) tortious interference with contract; (5) tortious interference with prospective relations; (6) violation of the Texas Antitrust Act; and (7) violation of the Sherman Act. MCI now moves for summary judgment on a variety of grounds.

II. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Federal Rules of Civil Procedure 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 319, 322, 106 S.Ct. 2548, 2551, 91 L.Ed.2d 268 (1985); *Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 79 (5th Cir. 1987). The party moving for summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 319, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Burfield v. Brown, Moore & Flint, Inc.*, 51 F.3d 583, 588 (5th Cir. 1995). A fact is "material" if its resolution in favor of one party might affect the outcome of the action under governing law. *Anderson v. Liberty Lobby*, 477 U.S. 252, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). No genuine issue of material fact exists if a rational trier of fact could not find for the nonmoving party based on the evidence presented. *National Ass'n of Gov't Employees v. City Pub. Serv. Bd.*, 40 F.3d 698, 712 (5th Cir. 1994).

To withstand a properly supported motion, the nonmoving party who bears the burden of proof at trial must come forward with evidence to support the essential elements of its claim. *Id.* (citing *Celotex Corp.*, 477 U.S. at 321-323). "[A] complete failure of proof concerning an essential element of the nonmoving party's cases renders all other facts immaterial." *Celotex Corp.*, 477 U.S. at 323.

The Court must consider all evidence in the light most favorable to the nonmoving party. *National Ass'n of Gov't Employees,* 40 F.3d at 712-713. "Conclusory allegations unsupported by specific facts, however, will not prevent the award of summary judgment . . . ." *Id.* at 713 (quoting *Anderson,* 477 U.S. at 249).

Thus, summary judgment is appropriate when, in the absence of factual disputes, one or more of the essential elements of a claim or defense before the court is not in doubt and judgment may be entered on the basis of purely legal considerations. *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). As stated by the Supreme Court in *Celotex*, "[t]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)...." 477 U.S. at 323, 106 S.Ct at 2552 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986)). Therefore, by its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. [sic] 477 U.S. at 247-248, 106 S.Ct. at 2510 (emphasis in original).

With regard to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Id.*

Finally, with regard to the role of the trial court in reviewing a motion for summary judgment and the evidence offered in support thereof, it is well settled that the Court's only function is to ascertain whether there is an issue of material fact to be tried. A trial court is not at liberty to decide any factual issues it finds in the records or to make credibility determinations. As explained by the Supreme Court:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson, 477 U.S. at 255, 106 S.Ct. at 2513. In other words, a. judge assessing the "persuasiveness" of evidence presented on a motion for summary judgment may discount such evidence as unspecific or immaterial, but not as unbelievable. *Leonard v. Dixie Well Service & Supply, Inc.,* 828 F.2d 291, 294 (5th Cir. 1987).

Utilizing these standards, the Court scrutinizes ATI's claims as to their susceptibility to MCI's motion for summary judgment.

III. ATI'S State Law Claims: Preempted by the Federal Communications Act?

MCI first moves for summary judgment as to ATI's state statutory and common law claims on the ground that they are preempted by the Federal Communications Act, 47 U.S.C. §§151-613 ("FCA"). ATI takes the position that its claims are preserved by the savings clause contained in the FCA.

The preemption doctrine is derived from the Supremacy Clause in the United States Constitution which provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art VI, cl. 2. Under the Supremacy Clause, state laws which "'interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution,' are invalid." *Wisconsin Pub. Intervenor v. Mortier,* 501 U.S. 597, 604, 111 S.Ct. 2476, 2481, 115 L.Ed.2d 532 (1991) (quoting *Gibbons v. Ogden,* 22 U.S. (9 Wheat), 1, 21, 6 L.Ed. 23 (1824)).

The primary inquiry in all preemption cases is the objective or purpose of Congress in enacting the particular statute. *See Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 208, 105 S.Ct. 1904, 1909-10, 85 L.Ed.2d 206 (1985); *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 517, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992). Congressional intent may be expressly stated in the language of the statute, or may be implied by the structure and purpose of the statute. *See Cipollone,* 506 U.S. at 517, 112 S.Ct. at 2617. Absent an express congressional statement, state law may be preempted in two situations; first, if the state law actually conflicts with federal law, *see id.; Pacific Gas & Elec. Co. v. Energy Resources Conservation and Development Comm'n,* 461 U.S. 190, 204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983); or, second, if federal law so thoroughly occupies a legislative field "'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Cipollone,* 505 U.S. at 517, 112 S.Ct. at 2617 (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)).

In the instant case, MCI argues that the comprehensive regulatory scheme of the Communications Act evidences Congress' intent to preempt the entire field. The express purpose of the Communications Act is to "regulat[e] interstate and foreign commerce in communication by wire and radio so as to make available ... to all the people of the United States a rapid, efficient ... communication service with adequate facilities at reasonable charges." 47 U.S.C. §151 (1988). To effectuate that end, the Act governs "all interstate ... communications by wire or radio and ... all persons engaged within the United States in such communication," 47 U.S.C. §152(a), and provides that an interstate telephone carrier's "charges, practices, classifications, and regulations for and in connection with [its] communications service, shall be just and reasonable." 47 U.S.C. § 201(b).

In support of its preemption argument, MCI cites the Court primarily to *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*, 391 F.2d 486 (2d Cir. 1968). In *Ivy*, the plaintiff alleged grossly negligent and unreasonably delayed installation of telephone lines and grossly negligent operation of the lines, and claimed that federal jurisdiction existed under the Communications Act. The district court dismissed the complaint for lack of subject matter jurisdiction, finding that the claims of negligence and breach of contract did not arise out of the Communications Act, but rather out of state tort and contract law. On appeal, the Second Circuit reversed and remanded, holding that although the plaintiff's claims were not governed by the Communications Act, such claims were governed by federal common law emanating from the Communications Act. Based on its review of several Supreme Court cases, the Second Circuit concluded that "questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law and ... the states are precluded from acting in this area." *Ivy*, 391 F.2d at 491. Citing this language, MCI contends that ATI's state law claims, because they relate to communications services, are preempted by the Communications Act. As explained below, MCI's argument fails.

As pointed out by ATI in its response, many cases decided after *Ivy* have found that state law claims such as those asserted by ATI in this case are not barred, but have been preserved by the "savings clause" of the Communications Act. For example, in *Cooperative Communications, Inc. v. AT&T*, 867 F. Supp. 1511 (D. Utah 1994), CCI, the plaintiff, an aggregator telecommunications company,[6] brought state law claims against AT&T for intentional interference with prospective economic relations, interference with contract, business disparagement, breach of covenant of good faith and fair dealing, unfair competition, violation of the Utah Uniform Trade Secrets Act, and violation of the Federal Communications Act. AT&T, relying on *Ivy*, moved for dismissal of the state claims on the ground that they were preempted by the Communications Act. The district court denied the motion, explaining:

> The court in *Ivy* did not address the "savings clause: of the Communications Act, set forth at section 414. The savings clause provides:
>
> > §414 Exclusiveness of Chapter
> >
> > Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.
>
> 47 U.S.C. §414. At issue, then, is whether savings clause preserves CCI's state causes of action against AT&T.
>
> Courts in other jurisdictions have held that the savings clause preserves causes of action for breach of duties distinguishable from those created under the Act. For example, in *Kellerman v. MCI Telecommunications Corp.* 112 Ill.2d 428, 98 Ill.Dec. 24, 493 N.E.2d 1045, *cert. denied*, 479 U.S. 949, 107 S.Ct. 434, 93 L.Ed.2d 384 (1986), the Illinois Supreme Court ruled that "state law remedies which do not interfere with the Federal government's

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[6] As an aggregator company, CCI purchased large quantities of long distance communication services from AT&T at discount rates which it then sold to persons or entities using smaller amounts of long distance service at a price lower than they could have obtained from AT&T directly.

authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by section 414." *Id.*, 98 Ill.Dec. at 30, 493 N.E.2d at 1051. In *Kellerman*, the plaintiffs brought state law claims of fraud and deceptive advertising against MCI, a provider of long-distance telephone service. MCI argued that the claims were preempted by the Communications Act, relying, in part, on *Ivy*. The *Kellerman* court rejected that argument, and in reviewing the holding of *Ivy*, as well as the language of the savings clause, stated:

> [W]e believe that section 414, when considered in the context of the entire act, should be construed as preserving State-law "causes of action for breaches of duties distinguishable from those created under the act." State-law remedies which do not interfere with the Federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by section 414.

Id. (quoting *Puerto Rico Telephone Co. v. FCC*, 553 F.2d 694, 708 (1st Cir. 1977)).

Similarly, in *Bruss Co. v. Allnet Communications Services*, 606 F.Supp. 401 (N.D.I11. 1985), the court held that section 414 preserved the common law claims of the plaintiffs. The plaintiffs had sued Alllnet, a provider of long-distance telephone services, alleging common law fraud and violations of Illinois' deceptive trade and consumer fraud acts. The court found that the duties owed by the defendants under the common law causes of action were different from those duties created by the Communications Act. The court stated:

> None of these causes of action conflicts with provisions of the Communications Act or interferes in any way with the regulatory scheme implemented by Congress. The Court therefore concludes that §414 applies to preserve these causes of action.

Id. at 411. *See also Financial Planning Inst., Inc., v. American Tel & Tel. Co.*, 788 F.Supp. 75 (D.Mass. 1992). The *Financial Planning* court clarified the intended function of the savings clause:

> Not only did Congress not express an intent to provide for an exclusive federal remedy for a breach of contract for telecommunication services, but by enacting the savings clause, Congress specifically provided for the preservation of existing statutory and common law claims in addition to federal causes of action.
>
> *Id.* at 77.
>
> In the instant case, six of CCI's claims are based on state common law or state statutory grounds: intentional interference with prospective economic relations; interference with contract; business disparagement; breach of the covenant of good faith and fair dealing; unfair competition; and violation of the Utah Uniform Trade Secrets Act. CCI contends that these claims exist as separate cause of action, and were not created by the Communications Act. AT&T has not cited to any specific sections of the Communications Act which conflict with CCI's state law claims. Additionally, AT&T's contention that these claims are preempted ignores the purpose underlying section 414. In enacting the Communications Act, it is manifest that Congress intended to occupy the field of

> telecommunications, in order to make available to all people of the United States a rapid, efficient, reasonably-priced communications service, governed by one uniform regulatory scheme. However, inclusion of the savings clause clearly indicates Congress' intent that independent state law cause of action, such as interference with contract or unfair competition, not be subsumed by the Act, but remain as separate causes of action. Hence, while some state law claims may relate to providers of telecommunications service, but nevertheless stand as independent claims not arising under the Communications Act. Based on the foregoing, this Court holds that section 414 of the Federal Communications Act preserves CCI's state law claims.

867 F.Supp. 1515-1516.

Similarly in *In re Long Distance Telecommunications Litigation*, 831 F.2d 627 (6th Cir. 1987), the Sixth Circuit found that the district court erred in denying the plaintiffs' motion to remand on the ground that their state law claims for deceit and fraud, based on the defendant long distance telephone service providers' failure to notify them of the practice of charging for uncompleted calls, were preempted by the Communications Act. According to the Sixth Circuit, those claims, unlike those based on §201 of the Act, do not require agency expertise for their treatment and are "within the conventional experience of judges." 831 F.2d at 633. Moreover, the alleged torts involved in its case, which involved a failure by the defendants to notify customers of a practice, were not like those involved in *Ivy*, which involved the level of service provided by the defendants. Finally, the Sixth Circuit noted, the savings clause of the Communications Act was virtually identical to that of the savings clause before the Supreme Court in *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976), a case in which the Supreme Court found that the common-law action for fraudulent misrepresentation and the Aviation Act, not being "absolutely inconsistent," could coexist, "as contemplated by §1106 [the saving clause of the Aviation Act]." 831 F.2d at 634 (quoting *Nader*, 426 U.S. at 300, 96 S.Ct. at 1985).

The Court finds that the reasoning of *Cooperative Communications, Inc.* and *In re Long Distance Telecommunications Litigation* applies in the instant case. ATI's state law-claims do not involve the level of service provided by MCI. Rather, they concern alleged acts of misrepresentations by MCI to induce ATI to enter into the contract and subsequent intentional torts by MCI to eliminate ATI from the I-800 market in Mexico. Therefore, based on *Cooperative Communications, Inc.* and *In re Long Distance Telecommunications Litigation* and the reasoning contained therein, the Court finds that ATI's state law claims are preserved by the savings clause of the Communications Act.

IV. The Filed Tariff Doctrine

MCI also argues that it is entitled to summary judgment as to ATI's state law claims on the ground that they are barred by the so-called filed tariff doctrine. The Court finds that MCI is correct only to the extent that ATI attempts to assert a claim against it for failing to provide the I-800 service after Telmex disconnected it.

The MCI Tariff provides that MCI 800 Service International Call Coverage may not be acquired and used for resale in foreign jurisdictions where MCI's PTT partners either have blocked or interrupted MCI 800 or have threatened to do so, because of the resale activities being conducted within that country by MCI customers.[7] MCI's Tariff also provides that MCI is not liable for any act or omission of any other company or companies furnishing a portion of this service.[8] Finally, MCI's Tariff prohibits use of MCI's service for any unlawful purpose.[9]

The Court has previously determined that ATI's resale of the I-800 service to Mexican customers without a concession from the SCT was unlawful under Mexican law. Furthermore, by ATI's own admission, it was Telmex who terminated ATI's I-800 service. Therefore, the above-cited provisions of MCI's Tariff apply to bar any attempt by ATI to hold MCI liable under a breach of contract claim for failing to provide the I-800 service after its disconnection by Telmex. However, as to ATI's claim that MCI conspired with Telmex and SBC to interfere with its attempt to contract with AT&T for the I-800 service, the Court finds, for reasons set out below, that the filed-tariff doctrine does not apply.

Section 203 of the Communications Act requires common carriers to file with the Federal Communications Commission a listing of the terms and conditions under which they will provide services to their customers. This listing, called a tariff, also set forth the charges, classifications, practices and regulations for that particular tariff. *MCI Telecommunications v. Best Telephone Co.*, 898 F.Supp. 868, 872 (S.D.Fla. 1994). Once filed, the tariff exclusively controls the rights and liabilities of the parties as a matter of law. *Id.* (citation omitted). Because the tariff is filed, customers are presumed to have constructive knowledge of the rates governing their telecommunications service. *Marcus v. AT&T Corp.*, 938 F.Supp. 1158, 1159 (S.D.N.Y. 1996) (citing *Kansas City S.R. Co. v. Carl*, 227 U.S. 639, 653, 33 S.Ct. 391, 395, 57 L.Ed. 683 (1913)). Consequently, any privately negotiated rates that depart from the filed rate are superseded. 47 U.S.C. §203(c); *Armour Packing Co. v. United States*, 209 U.S. 56, 81, 28 S.Ct. 428, 435, 52 L.Ed. 681 (1908). This doctrine, commonly referred to as the "filed rate doctrine," bars suits against regulated utilities grounded on the allegation that the rates charged by the utility are unreasonable. *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994). The filed rate doctrine prevents an aggrieved customer from enforcing contract rights that contravene governing tariff provisions or from asserting estoppel against the carrier. *Pay Phone Concepts, Inc. v. MCI Telecommunications Corp.*, 904 F.Supp. 1202, 1207 (D.Kan. 1995).

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[7] *See* MCI's Tariff, Section C, para. 3.0862 n. 2. MCI's Tariff is attached to the Affidavit of James E. Kerr, labeled as Tab D in the Appendix to MCI's Motion for Summary Judgment (Docket Entry No. 80).

[8] *See* MCI's Tariff, Section B, para. 4.04, 17th revised page 11.

[9] *See* MCI's Tariff, Section B, para. 6.061, 6th revised page 12.2.2.

The purpose of the filed rate doctrine is two-fold. First, the Supreme Court has long-held that the reasonableness of rates in a regulated industry is a question solely for the governing regulatory body. *See Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922). Second, it prevents utilities from discriminating in the prices they charge for the same service among different ratepayers. *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990). Thus, non-justiciability and anti-discrimination are the core purposes of the doctrine. *Fax Telecommunicaciones v. AT&T*, 952 F.Supp. 946, 951 (E.D.N.Y. 1996).

In *CCI, supra*, AT&T argued, like MCI does here, that the plaintiff's state law claims were barred by the filed tariff doctrine. The district court rejected the argument, observing:

> In the instant case, AT&T points out that section 203 of the Act requires filing of tariffs not only as to the rates to be charged, but also with

> regard to the classifications, regulations, and practices affecting such charges. AT&T asserts that CCI's claims pertain to AT&T's business practices in providing telecommunications services, and therefore, inasmuch as CCI's claims against AT&T are based upon the alleged misrepresentations by AT&T regarding its rates, practices, or services, those claims are barred by the filed tariff doctrine. This Court declines to read the word "practices" so broadly. AT&T has cited no case law in support of such a reading.
>
> Additionally, CCI is quick to point to a major difference between typical filed-tariff cases and the case at bar. Unlike the plaintiff in *Marco*, who was attempting to enforce a contract containing rates below the tariff rates, CCI is not seeking to enforce AT&T's alleged misrepresentations. Rather, CCI clams that AT&T made fraudulent representations to CCI's customers regarding the rates that CCI would charge and the dealings between AT&T and CCI. CCI is seeking damages for intentional interference with prospective economic relations and business disparagement resulting from those alleged misrepresentations. Allowing CCI to proceed with its state law claims will not result in discrimination against other AT&T customers in favor of CCI. Therefore, this Court holds that the filed tariff doctrine does not act to bar CCI's state law claims against AT&T.

867 F.Supp. at 1518-1519.

The same reasoning applies in the case at bar. ATI's claims in no way concern the rates charged by MCI. Likewise, ATI does not seek to enforce any alleged misrepresentations by MCI concerning rates. Rather, ATI is seeking damages for MCI's alleged intentional misrepresentations during the negotiation of the contract and the intentional interference by MCI with its business relations by its termination of the I-800 service and by its conspiring with Telmex and the other defendants to prevent ATI from obtaining the I-800 service from AT&T.

Moreover, MCI's Tariff FCC No. 1 specifically provides that "MCI's liability for willful misconduct, if established as a result of judicial or administrative proceedings, is not limited by this tariff."[10] In *Fax Telecommunicaciones*, the district court rejected AT&T's argument that similar language[11] in its filed tariff did not establish a separate cause of action for willful misconduct, but rather merely modified the tariff's limitation of liability in certain narrow circumstances, noting:

> AT&T's argument ... places the exception before the rule. First, although the Court agrees that the entire liability provisions of the tariff must be read as a whole, the more reasonable reading of the provision is that AT&T's liability for willful misconduct is limited only when a dispute relates to the installation, maintenance, provision or repair of service. In claims unrelated to these specifics, AT&T is liable for willful misconduct.

952 F.Supp. at 955.

A case more directly on point is *MCI Telecommunications Corp. v. TCI Mail, Inc.*, 772 F.Supp. 64

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[10] *See* MCI's Tariff F.C.C. No. 1, Section B, para. 4.02, 13th Revised page 10. MCI's Tariff F.C.C. No. 1 is attached to the Affidavit of James E. Kerr, labeled as Tab D in the Appendix to MCI's Motion for Summary Judgment (Docket Entry No. 80).

[11] AT&T's tariff provided in pertinent part that:

> The Company's liability, if any, for its willful misconduct is not limited by this tariff. With respect to any other claim or suit, by a Customer or by any others, for damages associated with the installation, provision, termination, maintenance, repair or restoration of [long-distance service]...the Company's liability, if any, shall not exceed an amount equal to the initial period charge provided for under this tariff.

(D.R.I. 1991). In *TCI Mail,* MCI brought suit against TCI to recover a deficiency in payment for telecommunications services provided to TCI. TCI filed a counterclaim in which it alleged that, before agreeing to provide the service, MCI had represented that it would charge a much lower rate than the rate it ultimately charged. TCI claimed that it had an oral agreement with MCI, and that MCI breached the contract and committed tortious misrepresentation. MCI moved for dismissal of all of TCI's counterclaims as barred by the filed tariff doctrine. Initially, the district court found that the contractual relations between MCI and TCI was governed by MCI Tariff FCC No. 1, the same tariff which governs the contractual relations between ATI and MCI in the instant case. However, the district court found that this conclusion did not end its analysis of TCI's counterclaims, explaining:

> By its own terms, the MCI Tariff does not limit MCI's liability if judicial or administrative proceedings establish that MCI committed "willful misconduct." MCI Tariff, section B, para. 492, 9th Revised page 10. Viewing the pleadings in the light most favorable to TCI, as required by Fed.R.Civ.P. 12(b)(6) and 8(f), this Court understand TCI's Count I to allege that MCI's actions constituted "willful misconduct" and therefore violated the MCI Tariff, an alleged breach of contract. Count II similarly claims that the MCI Tariff allows liability for MCI's alleged "willful misconduct," which allegedly support tort liability for intentional misrepresentations.
>
> Does the Communications Act of 1934 prohibit recovery by TCI under any theory of liability, regardless of the terms of the MCI Tariff? Certainly, the tariff as a whole, and not merely the rates contained therein, is paramount. Otherwise, any provisions of the MCI Tariff would be meaningless. The entire MCI Tariff

> must be controlling, including the "willful misconduct" clause. *See Stand Buys, Ltd. v. Michigan Bel Tel. Co.*, 646 F.Supp 36, 37-38 (E.D.Mich. 1996) (applying "willful misconduct" clause of carrier's tariff, but concluding that no evidence of willful misconduct existed at summary judgment stage); *Pilot Indus. v. Southern Bell Tel. & Tel. Co.*, 495 F.Supp. 356, 361-62 (D.S.C. 1979) (applying clause in filed tariff allowing liability for willful or wanton conduct, but finding no evidence of willfulness or wantonness at summary judgment stage); *Sommer v. Mountain States Tel. & Tel. Co.*, 21 Ariz.App. 385, 387-88, 519 P.2d 874, 876-77 (1974) (holding that clause in filed tariff permitted recovery for willful acts).
>
> *The MCI Tariff itself does not clearly preclude a contract or tort claims against MCI based on its alleged "willful misconduct."* MCI has not attempted, moreover, to characterize the alleged representations of its salespeople as being outside the scope of their agency relationship. Recovery by TCI, therefore, is not precluded.

772 F.Supp. at 67-68 (emphasis added).

Like the courts in *Fax Telecommunicaciones* and *TCI*, this Court finds that the liability language contained in MCI's tariff does not preclude a tort claim against MCI based on its alleged willful misconduct. To the contrary, it expressly states that MCI's liability is not limited if it is determined in a judicial or administrative proceeding that MCI engaged in willful misconduct. However, it does bar ATI's claim for negligent misrepresentation, inasmuch as that claim does not involve willful misconduct by MCI.

Accordingly, the Court finds that MCI's argument that ATI's state law claims are barred by the filed tariff doctrine fails except as to ATI's claim of negligent misrepresentation and breach of contract. As to those two claims, MCI is entitled to summary judgment.

V. ATI'S Promissory Estoppel Claim

MCI moves for summary judgment on ATI's claim for promissory estoppel on the ground that promissory estoppel is not available where a contract exists between the parties governing the subject matter of the promise. ATI contends that it is entitled to maintain its promissory estoppel claim because the contract it had with MCI contains no provisions relating to or governing the promises and representations made by MCI. For the reasons set out below, the Court finds that the promissory estoppel claim is not available to ATI.

Promissory estoppel is normally a defensive theory. However, it may be asserted by a plaintiff as an affirmative ground for relief. *El Paso Healthcare System, Ltd. v. Piping Rock Corp.*, 939 S.W.2d 695, 698 (Tex.App.--El Paso, 1997, no writ) (citing *Adam v. Petrade Int'l, Inc.*, 754 S.W.2d 696, 707 (Tex.App.--Houston [1st Dist.] 1988, writ denied)); *Farah v. Mafrige & Kormanik, P.C.*, 927 S.W.2d 663 (Tex.App--Houston [1st Dist.]. 1996); *In re Texas Mortgage Services Corp.*, 761 F.2d 1068 (5th Cir. 1985). Under the doctrine of promissory estoppel, a promise may be binding if the promisor should reasonably expect that the promise will induce action or forbearance, the promise does in fact induce such action or forbearance, and the enforcement of the promise is necessary to avoid injustice. *Piping Rock*, 939 S.W.2d at 699 (citing *"Moore" Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 937 (Tex. 1972); *Adams*, 754 S.W.2d at 707). However, if a valid contract between the parties covers the alleged promise, promissory estoppel is inapplicable to that promise. Instead, the wronged party must seek damages under the contract. 939 S.W.2d at 699 (citing *Guaranty Bank v. Lone Star Life Ins. Co.*, 568 S.W.2d 431, 434 (Tex.Civ.App-Dallas 1978, *writ ref'd n.r.e.*)).

Under Texas law, the basic requirements of a promissory estoppel claim are: "(1) a promise, (2) foreseeability of reliance thereon by the promisor, and (3) substantial reliance by the promisee to his detriment." *Clardy Mfg. Co. v. Marine Midland Business Loans*, 88 F.3d 347, 360 (5th Cir. 1996) (quoting *English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983)). Texas courts have also established a fourth and separate requirement of a "definite finding that *injustice can be avoided only by the enforcement of the promise.*" *Clardy*, 88 F.3d at 360 (quoting *City of Beaumont v. Excavators & Constructors, Inc.*, 870 S.W.2d 123, 137 (Tex.App.--Beaumont 1933, writ denied) (emphasis in original)). In addition, the courts have emphasized that "estoppel requires a *reasonable* or *justified* reliance on the conduct or statement of the person sought to be estopped by the person seeking the benefits of the doctrine." *Clardy*, 88 F.3d at 360 (quoting *Traco Inc. v. Arrow Glass Co.*, 814 S.W.2d 186, 190 (Tex.App.--San Antonio 1991, writ denied) (emphasis in original and internal quotation marks omitted)), *cert denied*, — U.S. --, 117 S.Ct. 740, 136 L.Ed.2d 679.

ATI makes the following allegations with regard to its promissory estoppel claim:

> 11. During or before 1992, TELMEX entered into an agreement with MCI INTERNATIONAL INC. to provide international 800 (I-800) service from Mexico to the United States, MCI INTERNATIONAL, INC. provided this service to MCI TELECOMMUNICATIONS CORP. during and since 1992. MCI TELECOMMUNICATIONS CORP. advertised and offered for sale to its customers I-800 service for calls originating from Mexico, based on the services provided by TELMEX.

12. During 1993 and 1994, ATI contracted with MCI TELECOMMUNICATIONS CORP. for I-800 services from Mexico for itself and as agent for various customers. In addition to the I-800 services from Mexico, ATI offered a switching service carried out in Texas and elsewhere in the United States whereby customers could complete calls to a variety of U.S. 800 and other telephone numbers from Mexico. MCI represented to ATI that it had the authority and capacity to contract for telephone services through TELMEX between Mexico and the United States; that the proposed activity by ATI was within the terms of the tariff and in all respects a legal reuse of the services provided; that services would continue under the same legal terms in the future; that the rights and obligations of the parties under contract were enforceable and that MCI would provide the same services in the future with special accommodation to ATI as its business increased. These and other promises and representations induced ATI to enter into an agreement with MCI and were a producing cause of damages to ATI.

* * *

20. The Defendant, MCI, further made representations in the course of its business or in a transaction in which it had a pecuniary interest and MCI supplied false information for the guidance of the Plaintiff. MCI failed to exercise reasonable care or competence in obtaining or communicating the information to the Plaintiff. The Plaintiff suffered a pecuniary loss by justifiably relying on the

> representations made by MCI and the Plaintiff hereby sues for all damages sustained as a result of the negligent misrepresentations made by MCI.
>
> 21. It was reasonably foreseeable that the plaintiff would rely on the promises made. Further, plaintiff substantially relied on the promises made by the MCI defendants to its detriment. Injustice could be avoided only be (sic) enforcement of these promises. Plaintiff therefore affirmatively asserts the common law doctrine of promissory estoppel and hereby asks the jury to award it all damages sustained as a result of the conduct of the MCI defendants.

See Plaintiff's First Amended Complaint, pages 3 and 5.[12]

As the Court understands it, ATI is alleging that MCI made three misrepresentations to it during the negotiation of the contract. First, MCI allegedly represented that it had authority to sell the I-800 service to ATI. Second, MCI represented that ATI's resale of the I-800 service was within the terms of the MCI Tariff. Finally, MCI represented that ATI's proposed resale of the I-800 service was legal under Mexican law.

With regard to ATI's allegation that MCI told it that its resale of the I-800 service was permissible under Mexican law, the Court has already determined in passing on ATI's Motion for Partial Summary Judgment that ATI's provision of the I-800 service to Mexican residents without first obtaining a concession or permit from the SCT was illegal under Mexican law. Furthermore, ATI has cited the Court to no case, nor has the Court found any case in which a party asserted, much less prevailed on, a claim of promissory estoppel on the ground that the other party misquoted or misrepresented the law. It seems too obvious to state that ATI could not reasonably or justifiably rely on MCI's representation as to what the Mexican law was with respect to ATI's resale of the I-800 service. ATI could and should have ascertained for itself whether or not its resale of the I-800 service was legal under Mexican law. Therefore, MCI is entitled to summary judgment on this particular claim of promissory estoppel.

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[12] Docket Entry No. 51.

As for ATI's claim that MCI represented that it had the authority and capacity to contract with ATI to provide the I-800 service, the Court finds that ATI has not come forward with any evidence that MCI did not have authority to enter into the contract with ATI for the provision of the I-800 service to ATI. In fact, ATI has consistently maintained the position that its purchase of the I-800 service from ATI for resale to its customers was legal under Mexican law and that Telmex had no legal right to disconnect the service. Implicit in this assertion is that MCI had the authority to contract with ATI for the I-800 service.

The final misrepresentation allegedly made by MCI was that its resale of the I-800 service to ATI was within the terms of the MCI Tariff. As with ATI's earlier claim that MCI misrepresented that ATI's resale of the I-800 service was legal under Mexican law, the Court finds that ATI cannot show that its reliance on this alleged misrepresentation by ATI was reasonable or justified. The MCI Tariff was filed and open for inspection by ATI to determine for itself whether or not MCI was permitted to resell the I-800 service under the MCI Tariff. This being so, ATI is precluded from showing that it was entitled to rely on MCI's word as to its right to resell the I-800 service to ATI.

VI. ATI'S Tortious Interference Claims

MCI next argues that ATI's tortious interference claims are barred because they are in essence claims for breach of contract. According to MCI, ATI is seeking to recover damages for MCI's breach of its duty to provide the I-800 service as promised in its contract with ATI. Although this may state a claim for breach of contract, MCI argues, it does not provide the basis for a claim sounding in tort. ATI responds that its tortious interference claims against MCI are not for conduct related to the subject matter of the contract but are instead for MCI's interference with its arrangements and contracts with its I-800 international customers and its conspiring with Telmex and the other defendants to prevent ATI from subsequently obtaining I-800 service from AT&T. As explained below, ATI's argument fails as to its claim that MCI interfered with its contractual relationship with its I-800 international customers.

In *Southwest Bell Telephone Co. v. DeLanney*, 809 S.W.2d 493 (Tex. 1991), DeLanney brought suit against Southwestern Bell alleging negligence and violation of the Texas Deceptive Trade Practices--Consumer Protection Act ("DTPA") for its failure to publish his advertisement in the Yellow Pages. The trial court granted Bell's motion for a directed verdict as to the DTPA claim, but denied it as to negligence. The jury found that Bell was negligent in omitting DeLanney's advertisement from the Yellow Pages and the trial court rendered judgment for DeLanney. Bell appealed.

On appeal, the court of appeals, with one justice concurring and one justice dissenting, affirmed. The majority of the court held that Bell's cancellation of DeLanney's advertisement was correctly submitted as a negligence claim. The dissenting justice argued that because DeLanney sought damages for breach of a duty created the under contract, rather than a duty imposed by law, the claim sounded only in contract. The Texas Supreme Court reversed and remanded, explaining:

> If the defendant's conduct ... would give rise to liability independent of the fact that a contract

> exists between the parties, the plaintiff's claim may also sound in tort. Conversely, if the defendant's conduct ... would give rise to liability only because it breaches the parties' agreement, the plaintiff's claim ordinarily sounds only in contract.
>
> In determining whether the plaintiff may recover on a tort theory, it is also instructive to examine the nature of the plaintiff's loss. When the only loss or damages is to the subject matter of the contract, the plaintiff's action is ordinarily on the contract. *See* PROSSER AND KEETON AT 656; 1 J. EDGAR, JR. & J. SALES, TEXAS TORTS AND REMEDIES §1.03[4][b] at 1-36 (1990). We applied this analysis in *Jim Walter Homes, Inc. v. Reed,* 711 S.W.2d 617, 618 (Tex. 1986), where we wrote:
>
> > The acts of a party may breach duties in tort or contract alone or simultaneously in both. The nature of the injury most often determines which duty or duties are breached. When the injury is only the economic loss to the subject of a contract itself the action sounds in contract alone.
>
> Bell's duty to publish DeLanney's advertisement arose solely from the contract. DeLanney's damages, lost profits, were only for the economic loss caused by Bell's failure to perform. Although DeLanney pleaded his action as one in negligence, he clearly sought to recover the benefit of his bargain with Bell. We hold that Bell's failure to publish the advertisement was not a tort. Under our analysis in *Reed,* DeLanney's claim was solely in contract.

809 S.W.2d at 494-495. Finding that DeLanney had waived any claim for breach of contract by failing to submit any contract issues to the jury, the Supreme Court reversed the

judgment of the court of appeals and rendered a take nothing judgment against DeLanney.

Following the analysis used in DeLanney, the Court concludes that the only claim ATI could bring against MCI for not providing the I-800 service for which ATI contracted is one for breach of contract. The duty to provide the service arose from the contract and the injury for which ATI seeks damages is the economic loss it sustained as a result of MCI's failure to provide the I-800 service as provided by the contract. However, as this Court has determined prior hereto, ATI may not maintain this claim due to the cited liability provisions contained in the MCI Tariff. To the extent that ATI attempts to assert a separate claim for tortious interference based on MCI's failure to honor its contractual obligation to provide the I-800 service, the Court finds that it may not do so.[13]

However, the fact that ATI may not pursue a claim for tortious interference based on MCI's failure to provide the I-800 service as called for by the contract with ATI does not mean that ATI is barred from asserting a tortious interference claim based on MCI allegedly conspiring with Telmex and the SBC defendants to block ATI from contracting with AT&T for the I-800 service. Clearly, any actions taken by MCI to interfere with ATI's efforts to contract with AT&T would breach duties independent of those imposed by its contract with ATI. Likewise, the damages which ATI might recover would be for the economic loss it suffered from not being able to obtain the I-800 service from AT&T. Therefore, to the extent that it is based on MCI allegedly preventing it from contracting with

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[13] In light of its determination that the only claim ATI may assert against MCI for failing to provide the I-800 service is one for breach of contract, the Court finds no need to address MCI's additional arguments as to why it is entitled to summary judgment with respect to ATI's tortuous interference claim.

AT&T for the I-800 service, ATI may bring a claim for tortious interference.

However, ATI's success is short-lived. In order to prevail on this claim, ATI would have to show that it had the required concession from the SCT to provide the I-800 service to Mexican customers. The evidence of record, however, is that ATI never sought or obtained a concession from the SCT. Consequently, MCI is entitled to summary judgment on this tortious interference claim as well.

VII. ATI's Antitrust Claims

MCI moves for summary judgment as to ATI's claim for violation of the Texas Antitrust Act as being preempted by federal law. Specifically, MCI argues that ATI's allegation that MCI conspired with Telmex and the other defendants to restrain trade involving interstate and foreign commerce must be resolved under federal antitrust law. Therefore, because all the facts giving rise to ATI's claim occurred in Mexico, ATI must pursue its claim under federal law. ATI responds that the Fifth Circuit rejected this preemption argument in *Pounds Photographic Labs v. Noritsu America Corp.*, 818 F.2d 1219 (5th Cir. 1987) (holding that pre-1983 Texas antitrust statutes were not preempted by the Sherman Act; Texas antitrust statutes are supplementary to the federal regulatory scheme). Moreover, ATI contends, not all the acts in furtherance of the conspiracy occurred in Mexico, some of the acts took place in the United States. Although acknowledging that federal antitrust laws do not completely preempt state laws, MCI replies that as a general rule, federal antitrust laws govern interstate commerce and state antitrust laws apply to intrastate commerce. Therefore, because all the activities of which ATI complains occurred outside the United States, the Texas Antitrust Act does not apply. Moreover, because federal antitrust laws do not reach conduct involving foreign trade or commerce, such conduct is also exempt from the Texas Antitrust Act by virtue of §15.05(g) of the Texas

Business & Commerce Code. The Court will address this last argument first.

Section 1 of the Sherman Act prohibits conspiracy "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. §1. Section 2 of the Sherman Act prohibits monopolization and attempted monopolization "of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. §2. Although the Sherman Act applies to trade and commerce with foreign nations, it applies to foreign anti-trust conduct only to the extent that said conduct produces "some substantial effect in the United States." *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796, 113 S.Ct. 2891, 2909, 125 L.Ed.2d 612 (1993); *U.S. v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1, 4 (1st Cir. 1997). Specifically, pursuant to §6a of the Sherman Act, anti-trust conduct involving United States export commerce with foreign nations is actionable only if said conduct has a "direct, substantial, and reasonably foreseeable" effect on one of the following: (1) on United States domestic commerce; (2) on United States import commerce; or (3) on export commerce only to the extent that such conduct injures export business in the United States. 15 U.S.C. §6a. The limitation of §6a applies even where the anti-trust conduct originates in the United States or involves American-owned entities operating abroad. *Eurim-Pharm GmbH v. Pfizer, Inc.*, 539 F.Supp. 1102, 1106 (S.D.N.Y. 1984).

Earlier in this case the Court dismissed ATI's claims against Telmex, finding that it lacked personal jurisdiction over Telmex. In the course of addressing the jurisdictional issue, the Court was required to determine whether ATI had stated a claim against Telmex for violation of the Sherman Act and found that it had not, observing:

> [A]ll the activities of Telmex of which complains occurred outside the United States. Moreover, the market from which ATI alleges to have been

excluded by Telmex is the I-800 service market in Mexico, outside the United States. Neither the fact that ATI is an American corporation or that SBC and MCI are American corporations provide the requisite nexus with American trade that would bring the alleged illegal activity within the purview of the Sherman Act. *See Power East Limited v. Transamerica Delaval Inc.*, 558 F.Supp. 47, 49 (S.D.N.Y. 1983) (Sherman Act claim of plaintiff, a Cyprus corporation, failed to state cause of action, where activities complained of all occurred outside United States, market from which plaintiff was supposedly excluded was outside the United States, and plaintiff made no suggestion of a "relevant market" in United States nor mentioned any American competitors; fact that principal shareholder of plaintiff was United States citizen and one of the defendants was a corporation organized within States did not provide requisite nexus with American trade that would bring alleged illegal activity within purview of Sherman Act). *See also Optimum v. Legent Corporation*, 926 F.Supp. 530 (W.D.Pa. 1996) (holding that foreign corporation which marketed and distributed computer software products of American corporation in Argentina failed to establish that termination of its marketing contract by another foreign corporation resulted in anticompetitive effect on United States' domestic commerce, and thus district court lacked subject matter jurisdiction over corporate distributor's claim that termination of marketing contract violated Sherman Act; allegation that income flowed between corporations was insufficient to establish requisite domestic effect and distributor, a foreign corporation, could not maintain action under Sherman Act based merely upon injury to United States exporters attempting to enter Argentina computer software market).

As observed by the Court of Appeals for the Tenth Circuit:

> The principal purposes of the antitrust laws are protection of American consumers and American export and investment opportunities. If American interests are at stake we may impose liability for conduct outside our borders that has consequences within our borders. *See Alcoa,* 148 F.2d at 443. When the contacts with the United States are few, the effects upon American commerce minimal, and the foreign elements overwhelming, however, we do not accept jurisdiction. We believe that the analysis set forth in *Timberlane Lumber Co. v. Bank of America,* 549 F.2d at 613-15, contains the proper elements for consideration. To support jurisdiction of American court, plaintiff must first show that the challenged activity had an actual effect on United States commerce. Then we must decide if "the interest of, and links to, the United States--including the magnitude of the effect on American foreign commerce--are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority." *Id.* at 613.

Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864, 869 (10th Cir. 1981).

In short, the antitrust laws of the United States do not regulate the competitive conditions of other nations' economies. *Matushita Electric*

> *Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). *See also Industrial Inv. Develop. Corp. v. Mitsui & Co.*, 671 F.2d 876, 883 (5th Cir. 1982) (district court should not apply the antitrust laws to foreign conduct or foreign actors if such application would violate principles of comity, conflicts of law or international law).
>
> In view of the fact that the conduct of Telmex all occurred in Mexico, that the market from ATI claims to have been excluded is the I-800 service in Mexico, and that the resultant economic consequences are felt predominately by Mexican consumers, the Court finds it does not have subject matter jurisdiction of ATI's antitrust claims against Telmex.

See Court's Order of June 20, 1997, pages 8-10.[14]

Even though they were made in the context of deciding if Telmex was subject to the personal jurisdiction of this Court, the Court finds that these findings are also determinative of whether or not ATI has a claim against MCI under the Sherman Act. As the Court noted in the above-quoted excerpt from its previous order, the market from which ATI claims to have been excluded is the I-800 service in Mexico. Likewise, the resultant economic consequences of Telmex and the other defendants terminating ATI's I-800 service was felt predominately in Mexico by Mexican consumers. Although ATI claims that it has evidence that the actions MCI took to provide Telmex with the information it needed to terminate ATI's I-800 service occurred in the United States, the Court finds that this is not enough to maintain a claim under the Sherman Act against MCI. Likewise, the fact that MCI is an American corporation does not provide a sufficient nexus with American trade to bring the alleged illegal action of MCI within the purview of the Sherman Act. *See Power East Limited v. Transamerica Delaval Inc.*, 558 F.Supp at 49. Furthermore, ATI's assertion that the income generated by its I-800 service flowed into the United States is insufficient to establish the requisite domestic effect. *Optimum, S.A.*, 926 F.Supp. at 533 (assertion by plaintiff that the income in issue flowed and would continue to flow between corporations located in the United States and corporations located in Argentina deemed insufficient to establish the requisite domestic effect required by §6(a).

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[14] Docket Entry No. 74.

Accordingly, the Court finds that ATI cannot maintain its federal antitrust claims against MCI. Consequently, because the antitrust laws of Texas do not reach activities exempt from the operation of the federal antitrust laws,[15] ATI's claims against MCI for violation of the Texas antitrust laws likewise fall to MCI's summary judgment motion.

CONCLUSION

Based on the above findings, it is hereby ORDERED that MCI Telecommunications Corporation and MCI International, Inc.'s Motion for Summary Judgment be, and the same is hereby, GRANTED.

SIGNED this the [5th] day of August, 1998.

/s/ D.W. Suttle
D.W. SUTTLE
Senior United States
District Judge

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[15] Section 15.05 of the Texas Free Enterprise and Antitrust Act provides in pertinent part that "[n]othing in this section shall be construed to prohibit activities that are exempt from the operation of the federal antitrust laws, 15 U.S.C. Section 1 et seq." Tex.Bus.&Com.CodeAnn. §15.05(g).

APPENDIX D

UNITED STATES DISTRICT COURT
W.D. TEXAS, SAN ANTONIO DIVISION

No. SA-96-CA-1064

ACCESS TELECOM, INC.,
PLAINTIFF,
v.
MCI TELECOMMUNICATIONS CORPORATION, ET AL.,
DEFENDANTS.

August 5, 1998

ORDER

SUTTLE, Senior United States District Judge.

The matter before the Court is the Motion for Summary Judgment filed by defendants SBC International, Inc., SBC Communications, Inc., SBC International, Inc., and SBC International Latin America, Inc. (hereinafter referred to collectively as "SBC") on September 4, 1997,[1] the response filed by Access Telecom, Inc. ("ATI") on September 26, 1997,[2] SBC's Reply filed on October 17, 1997,[3] and the

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[1] Docket Entry No. 115.

[2] Docket Entry No. 138. Attached hereto is ATI's Appendix to its response (Docket Entry No. 139).

[3] Docket Entry No. 147.

Advisory to the Court filed by ATI on December 12, 1997.[4] Having reviewed these documents, the supporting exhibits and affidavits attached thereto, and the relevant case law, the Court enters the following order.

I. Factual Background

ATI began operating in June 1993. One of the businesses it engaged in was the reorigination of international long distance calls from its customers in Mexico to parties located in the United States at rates cheaper than the customer would pay if it used the long distance services of Telefonos de Mexico ("Telmex"). SBC is a minority interest holder in Telmex. MCI is a provider of interstate and international telecommunications services to both commercial and residential users. On June 30, 1993, ATI executed a letter of authorization selecting MCI as its long distance carrier and provider of 800 numbers. On July 7, 1993, ATI executed an MCI Global Vision Enrollment Form and Agreement. On November 30, 1993, ATI executed an MCI Global Vision Enrollment Form replacing the July 7, 1993 agreement. The November 30, 1993 enrollment form incorporated by reference the terms and conditions of MCI Tariff FCC No. 1 ("the Tariff"). On August 6, 1994, ATI executed an MCI Vision VIP Enrollment Form and Agreement replacing the November 30, 1993 Agreement. The August 6, 1994 Enrollment Agreement also incorporated by reference the Tariff. MCI International ("MCI") is a participating carrier under the Tariff. Beginning in July 1994, Telmex began terminating ATI's I-800 services, claiming that ATI's I-800 service was in violation of Mexican law.

ATI filed the instant lawsuit against SBC and the other defendants in the 734th Judicial District Court, Bexar County, Texas. ATI alleges the following as to SBC:

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[4] Docket Entry No. 158.

10. Beginning in early 1994, TELMEX and/or SBC began to seek to interfere in the contractual relationship between MCI and ATI and/or customers of ATI for the purpose, at least in part, and with the effect of reducing or limiting competition in telephone services within Texas and the United States.

11. During or before 1992, TELMEX entered into an agreement with MCI INTERNATIONAL, INC., to provide international 800 (I-800) service from Mexico to the United States. MCI INTERNATIONAL, INC. provided this service to MCI TELECOMMUNICATIONS CORP during and since 1992. MCI TELECOMMUNICATIONS CORP. advertised and offered for sale to its customers I-800 service for calls originating from Mexico, based on the services provided by TELMEX.

12. During 1993 and 1994, ATI contracted with MCI TELECOMMUNICATIONS CORP. for I-800 services from Mexico for itself and as agent for various customers. In addition to the I-800 service from Mexico, ATI offered a switching service carried out in Texas and elsewhere in the United States whereby customers could complete calls to a variety of U.S. 800 and other telephone numbers from Mexico. MCI represented to ATI that it had the authority and capacity to contract for telephone services through TELMEX between Mexico and the United States, that the proposed activity by ATI was within the terms of the tariff and in all respects a legal reuse of the services

provided; that services would continue under the same legal terms in the future; that the rights and obligations of the parties under contract were enforceable and that MCI would provide the same services in the future with special accommodations to ATI as its business increased. These and other promises and representations induced ATI to enter into an agreement with MCI and were a producing cause of damages to ATI.

13. The services offered by ATI used and paid for the use of TELMEX lines provided to MCI INTERNATIONAL, INC., then to MCI TELECOMMUNICATIONS CORP. which were then sold under contract to ATI. Customers of ATI could save money on voice and facsimile calls between their Mexican offices and offices in the United States by the use of these services.

14. ATI expanded its business rapidly during 1994 and reached a revenue volume in excess of two million dollars per year. During middle and late 1994, TELMEX and/or SBC began a campaign to eliminate ATI as a source of potential competition, notwithstanding that the I-800 services offered by ATI were those very same services offered by MCI and that TELMEX was paid for each and every telephone call made through ATI. The auxiliary switching services offered by ATI allowed expanded use of the U.S. telephone system but all of these services were conducted within Texas and the United States.

15. During 1994, TELMEX and/or SBC demanded that MCI provide lists of its

customers that were reselling the MCI I-800 services provided through TELMEX, the resale of the I-800 service offered by MCI was specifically authorized under the contract with ATI and under the MCI tariff. Eventually MCI provided a list of customers including ATI and its customers, whether or not ATI acted directly or only as agent for the customers under a letter of agency. MCI TELECOMMUNICATIONS CORP. and MCI INTERNATIONAL, INC. agreed and conspired with TELMEX and/or SBC to eliminate ATI as a potential source of competition by restraining its access to telephone communications completely, with regard to I-800 service from Mexico, which constituted the entire business of ATI.

16. When TELMEX initially demanded a list of MCI customers who were reselling the MCI I-800 services, MCI resisted. However, TELMEX subsequently threatened to prevent MCI from conducting business in Mexico if MCI did not cooperate in this illegal and tortious activity. This conduct of TELMEX constitutes economic duress. The Plaintiff has been damaged by such economic duress and seeks to recover all actual damages as a result thereof.

17. In participating in the refusal to provide services to ATI, MCI breached its contract with ATI and violated its tariff by failing and refusing to perform under the contract agreement with ATI. Most of ATI's I-800 telephone lines from Mexico were cut off in late October or early November 1994.

MCI refused to provide replacement service or reconnect the service contracted for.

18. After MCI's refusal to provide replacement service and/or to reconnect the services contracted for, ATI notified MCI to transfer its remaining lines to American Telephone and Telegraph (AT&T), which had also begun offering I-800 service from Mexico. MCI personnel then conspired and cooperated with TELMEX and/or SBC to insure that ATI would not be able to obtain service through AT&T either directly to ATI or for ATI customers for whom ATI acted as an agent. By these actions, MCI and TELMEX and/or SBC interfered with the prospective business relations between ATI and AT&T.

19. At least one purpose of the cooperation and conspiracy between MCI and TELMEX and/or SBC was to limit access to the international telephone market by improperly restricting access to telephone services by ATI. The effect of this conspiracy was to eliminate all I-800 telephone services of ATI, putting them out of business entirely by early 1995. In addition, these actions reduced or eliminated telephone competition and availability of alternative services between Mexico and the United States and resulted in increased costs to Texas and U.S. companies.

* * *

30. As set forth above, the Plaintiff had a contract with one or more of the MCI defendants which was subject to interference.

The defendants, TELMEX and/or SBC, interfered with this contract in a willful and intentional manner. The interference by TELMEX and/or SBC was a proximate cause of damages to the Plaintiff and ATI suffered actual damages or loss as a result thereof.

31. In addition, TELMEX and/or SBC willfully and intentionally interfered with the contract between ATI and its customers which was a proximate cause of actual damages or loss to the Plaintiff.

32. As set forth above, at all times pertinent to this cause of action, ATI was continually soliciting new customers and its business continued to increase at a rapid rate. There was a reasonable probability that ATI would have entered into a contractual or business relationship with these customers The conduct of TELMEX and/or SBC was willful and malicious (intentionally and without just cause or excuse) by intentionally preventing the relationship from occurring with the purpose of harming the Plaintiff. Actual harm or damage was sustained by the Plaintiff as a result.

33. In addition to the above, there was a reasonable probability that ATI would have entered into new and/or additional contractual relationships with the MCI defendants. The conduct of TELMEX and/or SBC was willful and malicious (intentional and without just cause or excuse) by intentionally preventing the relationship from occurring with the purpose of harming the plaintiff. Actual harm or damage was sustained by the Plaintiff as a result.

34. The conduct of TELMEX and/or SBC constitutes a contract, combination, or conspiracy in restraint of trade or commerce occurring wholly or partly within the State of Texas in violation of §14.05(a) of the Texas Free Enterprise and Anti-Trust Act of 1983, §15.01 *et seq.* TEX. BUS. & COMM. CODE (the Texas Anti-Trust Act).

35. The conduct of TELMEX and/or SBC further constitutes a monopoly, attempt to monopolize, or a conspiracy to monopolize trade or commerce in violation of §15.05(b) of the Texas Anti-Trust Act.

36. As a result of the above and foregoing, the Plaintiff is a person whose business or property has been injured by reason of the referenced violations of the Texas Anti-Trust Act. The Plaintiff seeks the actual damages sustained as a result thereof.

37. The conduct of TELMEX and/or SBC was willful and/or flagrant. The Plaintiff is therefore entitled to recover threefold the damages sustained pursuant to the Texas Anti-Trust Act.

38. The conduct of TELMEX and/or SBC further constitutes:

a. a contract, combination in the form of trust or otherwise, and/or a conspiracy in restraint of trade or commerce among the several states or with foreign nations; and/or

b. a monopoly, or attempt to monopolize, and/or a combination or conspiracy to monopolize a part of the trade or commerce among the several states, or with foreign nations.

Such conduct is in violation of the Anti-Trust laws of the United States as defined in 15 U.S.C. § 12.

39. The Plaintiff has sustained damages as a result of these violations of the Anti-Trust laws and is entitled to recovery threefold the amount of these damages.

40. The defendants acted with a specific intent to cause substantial injury to the Plaintiff.

41. Pleading in the alternative, and not by way of election, when viewed objectively from the standpoint of the actor at the time of its occurrence involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others or of which SBC had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others. The Plaintiff therefore seeks punitive or exemplary damages in an amount to be determined by the trier of fact.

42. At all times material to this cause, the defendant, TELMEX was acting within the authority expressly conferred upon TELMEX by the defendant SBC, alternatively, within the authority necessarily implied in order for the defendant TELMEX to perform and exercise the authority granted.

43. With regard to the authority of the defendant, TELMEX, to act as alleged, Plaintiff will show as a further alternative that the defendant SBC has in all things

> ratified the exercise of authority by the defendant, TELMEX, in that the defendant SBC has accepted the benefits of the defendant TELMEX's activities.
>
> 44. Pleading in the alternative, and not by way of election, the Plaintiff would show as follows:
>
> 45. At all times material to this cause, the defendant SBC was acting within the authority expressly conferred upon SBC by the defendant TELMEX, or, alternatively, within the authority necessarily implied in order for the defendant, SBC to perform and exercise the authority expressly granted.
>
> 46. With regard to the authority of the defendant, SBC to as alleged, plaintiff will show as a further alternative that the defendant TELMEX has in all things ratified the exercise of authority by the defendant, SBC in that the defendant TELMEX has accepted the benefits of the defendant SBC's activities.

See Plaintiff's First Amended Original Complaint, pp. 3-9.

II. Summary Judgment Review Standard

Rule 56(c) provides that "[summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden of informing the district court of the basis for the motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which the moving party believes demonstrate the absence of a genuine issue of material fact.

Celotex corp. v. Catrett, 477 U.S. 317, 25, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986); *Meadowbriar Home for Children, Inc. v. G.B. Gunn*, 81 F.3d 521, 533 (5th Cir. 1996). The moving party has the burden of showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Willis v. Roche Biomedical Lab., Inc.*, 21 F.3d 1368, 1371 (5th Cir. 1994). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nomoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 956 (5th Cir. 1993).

Once the movant carries this burden, the burden shifts to the nonmovant to show the existence of a genuine issue for trial. *Celotex*, 477 U.S. at 323-26, 106 S.CT. at 2553-54; *Matsushita Electric Indus. Co. v. Zenith Radio*, 475 U.S. 574, 585-87, 106 S.CT. 1348, 1355-56, 89 L.Ed.2d 538 (1986). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing the existence of a genuine issue for trial. *Liberty Lobby*, 477 U.S. at 256-57, 106 S.CT. at 2514-15. Unsubstantiated or conclusory assertions that a fact issue exists will not suffice. *See Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1442 (5th Cir. 1993); *Thomas v. Price*, 975 F.2d 231, 235 (5th Cir. 1992). The nonmovant "must adduce admissible evidence which creates a fact issue concerning the existence of every essential component of that party's case." *Krim*, 989 F.2d at 1442. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Liberty Lobby*, 477 U.S. at 248, 106 S.Ct. at 2510. Factual disputes that are unnecessary or irrelevant will not be counted. *Id.* (citing 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE § 2725, pp. 93-95 (1983)). In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden. *Liberty Lobby*, 477 U.S. at 254-56, 106 S.Ct. at 2513-14.

All justifiable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus.*, 475 U.S. at 587, 106 S.CT. at 1356. "If the record, viewed in this light, could not lead a rational trier of fact to find" for the nonmovant, summary judgment is proper. *Kelly v. Price Macemon, Inc.*, 992 F.2d 1408, 1413 (5th Cir. 1993), *cert. denied*, 510 U.S. 1043, 114 S.CT. 688, 126 L.Ed.2d 656 (1994) (citing *Matsushita*, 475 U.S. at 577-78, 106 S.CT. at 1351). On the other hand, if "the factfinder could reasonably find in [the nonmovant's] favor, then summary judgment is improper." *Id.* (citing *Liberty Lobby*, 477 U.S. at 249-51, 106 S.CT. at 2511). Finally, even if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that "a better course would be to proceed to a full trial." *Liberty Lobby*, 477 U.S. at 255-56, 106 S.CT. at 2514. Accord *Veillon v. Exploration Services, Inc.*, 876 F.2d 1197, 1200 (5th Cir. 1989); 10A. C. WRIGHT, A. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE §2728 (1983).

Utilizing these standards, the Court scrutinizes ATI's claim as to their susceptibility to SBC's motion for summary judgment.

III. ATI's Tortious Interference Claim

SBC moves for summary judgment as to ATI's claim that it interfered in the contractual relationship between ATI and MCI, ATI and its customers, and ATI's contractual relations with AT&T on the ground that ATI's contracts were unlawful under the laws of Mexico and the United States. SBC also claims that its interference was privileged. Naturally, ATI counters that its service was lawful under the laws of both countries and that SBC's actions were not privileged.

The Court has earlier determined in its Order denying ATI's motion for partial summary judgment that ATI's provision of the I-800 service without a concession from the SCT was unlawful under Mexican law. Therefore, SBC is entitled to summary judgment on ATI's claim for tortious interference with ATI's contractual relations with MCI, ATI's contractual relations with its customers, and ATI's contractual relations with AT&T.[5]

IV. ATI's Antitrust Claims

SBC moves for summary judgment as to ATI's claim for federal and state antitrust violations on several grounds. First, it argues that the requisite conspiracy between two or more persons is lacking due to the fact that SBC is part owner and advisor of Telmex and therefore has a complete unity of economic interest with Telmex. Next, with respect to ATI's federal antitrust claims, it argues that the antitrust laws of the United States do not apply because the acts all occurred in Mexico, the relevant market from which ATI was excluded is the I-800 service market in Mexico, and the acts had no substantial effect on domestic interstate or foreign commerce in the United States. With regard to ATI's claim under the Texas Antitrust Act, SBC contends that the Texas Antitrust Act does not reach the conduct involved in this action because it occurred outside the United States. Moreover, because federal antitrust laws do not reach conduct involving foreign trade or commerce, such conduct is also exempt from the Texas Antitrust Act by virtue of §15.05(g) of the Texas Business & Commerce Code. The Court will address this last argument first.

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[5] As explained in its Order granting the MCI defendants motion for summary judgment, ATI would have to show that it had a concession from the SCT in order to prevail on its claim that MCI tortiously interfered with its contractual relations with AT&T. However, the evidence of record is that ATI never acquired a concession from the SCT. Therefore, it could not establish this essential element of its claim.

Section 1 of the Sherman Act prohibits conspiracy "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. Section 2 of the Sherman Act prohibits monopolization and attempted monopolization "of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. §2. Although the Sherman Act applies to trade and commerce with foreign nations, it applies to foreign anti-trust conduct only to the extent that said conduct produces "some substantial effect in the United States." *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796, 113 S.Ct. 2891, 2909, 125 L.Ed.2d 612 (1993); *U.S. v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1, 4 (1st Cir. 1997). Specifically, pursuant to §6a of the Sherman Act, anti-trust conduct involving United States export commerce with foreign nations is actionable only if said conduct has a "direct, substantial, and reasonably foreseeable" effect on one of the following: (1) on United States domestic commerce; (2) on United States import commerce; or (3) on export commerce only to the extent that such conduct injures export business in the United States. 15 U.S.C. §6a. The limitation of §6a applies even where the anti-trust conduct originates in the United States or involves American-owned entities operating abroad. *Eurim-Pharm GmbH v. Pfizer, Inc.*, 539 F.Supp. 1102, 1106 (S.D.N.Y. 1984).

Earlier in this case the Court dismissed ATI's claim against Telmex, finding that it lacked personal jurisdiction over Telmex. In the course of addressing the jurisdictional issue, the Court was required to determine whether ATI had started a claim against Telmex for violation of the Sherman Act and found that it had not, observing:

> [A]ll the activities of Telmex of which ATI complains occurred outside the United States. Moreover, the market from which ATI

alleges to have been excluded by Telmex is the I-800 service market in Mexico, outside the United States. Neither the fact that ATI is an American corporation or that SBC and MCI are American corporations provide the requisite nexus with American trade that would bring the alleged illegal activity within the purview of the Sherman Act. *See Power East Limited v. Transamerica Delaval Inc.*, 558 F.Supp. 47, 49 (S.D.N.Y. 1983) (Sherman Act claim of plaintiff, a Cyprus corporation, failed to state cause of action, where activities complained of all occurred outside United States, market from which plaintiff was supposedly excluded was outside the United States, and plaintiff made no suggestion of a "relevant market" in United States nor mentioned any American competitors; fact that principal shareholder of plaintiff was United States citizen and one of the defendants was a corporation organized within States did not provide requisite nexus with American trade that would bring alleged illegal activity within purview of Sherman Act). *See also Optimum v. Legent Corporation*, 926 F.Supp. 530 (W.D.Pa. 1996) (holding that foreign corporation which marketed and distributed computer software products of American corporation in Argentina failed to establish that termination of its marketing contract by another foreign corporation resulted in anticompetitive effect on United States' domestic commerce, and thus district court lacked subject matter jurisdiction over corporate distributor's claim that termination of marketing contract violated Sherman Act; allegation that income flowed between corporations was insufficient to establish requisite domestic effect and distributor, a foreign corporation, could not maintain action under Sherman Act based merely upon injury to United States exporters attempting to enter Argentine computer software market).

As observed by the Court of Appeals for the Tenth Circuit:

> The principal purposes of the antitrust laws are protection of American consumers and American export and investment opportunities. If American interests are at stake we may impose liability for conduct outside our borders that has consequences within our borders. *See Alcoa,* 148 F.2d at 443. When the contacts with the United States are few, the effects upon American commerce minimal, and the foreign elements overwhelming, however, we do not accept jurisdiction. We believe that the analysis set forth in *Timberlane Lumber Co. v. Bank of America,* 549 F.2d at 613-15, contains the proper elements for consideration. To support jurisdiction of American court, plaintiff must first show that the challenged activity had an actual effect on United States commerce. Then we must decide if "the interest of, and links to, the United States–including the magnitude of the effect on American foreign commerce–are

> > sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority." *Id.* at 613.
>
> *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864, 869 (10th Cir. 1981). In short, the antitrust laws of the United States do not regulate the competitive conditions of other nations' economies. *Matushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). *See also Industrial Inv. Develop. Corp. v. Mitsui & Co.*, 671 F.2d 876, 883 (5th Cir. 1982) (district court should not apply the antitrust laws to foreign conduct or foreign actors if such application would violate principles of comity, conflicts of law or international law).
>
> In view of the fact that the conduct of Telmex all occurred in Mexico, that the market from which ATI claims to have been excluded is the I-800 service in Mexico, and that the resultant economic consequences are felt predominantly by Mexican consumers, the Court finds it does not have subject matter jurisdiction of ATI's antitrust claims against Telmex.

See Court's Order of June 20, 1997, pages 8-10.[6]

Even though they were made in the context of deciding if Telmex was subject to the personal jurisdiction of this Court, the Court finds that these findings are also determinative of whether or not ATI has a claim against SBC under the Sherman Act. As the Court noted in the above-quoted excerpt from its previous order, the market from which ATI claims to have been excluded is the I-800 service in Mexico. Likewise, the resultant economic consequences of Telmex and the other defendants terminating ATI's I-800 service was felt predominantly in Mexico by Mexican consumers. Although ATI claims that it has evidence that the actions SBC took with Telmex to terminate ATI's I-800 service occurred in the United States, the Court finds that this is not enough to maintain a claim under the Sherman Act against SBC. Likewise, the fact that SBC is an American corporation does not provide a sufficient nexus with American trade to bring the alleged illegal action of SBC within the purview of the Sherman Act. *See Power East Limited v. Transamerica Delaval Inc.*, 558 F.Supp. at 49. Furthermore, ATI's assertion that the income generated by its I-800 service flowed into the United States is insufficient to establish the requisite domestic effect. *Optimum S.A.*, 926 F.Supp. at 533 (assertion by plaintiff that the income in issue flowed and would continue to flow between corporations located in the United States and corporations located in Argentina deemed insufficient to establish the requisite domestic effect required by §6(a)).

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[6] Docket Entry No. 74.

Accordingly, the Court finds that ATI cannot maintain its federal antitrust claims against SBC. Consequently, because the antitrust laws of Texas do not reach activities exempt from the operation of the federal antitrust laws,[7] ATI's claim against SBC for violation of the Texas antitrust laws likewise fail to survive SBC's summary judgment motion.

CONCLUSION

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[7] Section 15.05 of the Texas Free Enterprise and Antitrust Act provides in pertinent part that "[n]othing in this section shall be construed to prohibit activities that are exempt from the operation of the federal antitrust laws, 15 U.S.C. Section 1 et seq." Tex.Bus.&Com.CodeAnn. §15.05(g).

Based on the above findings, it is hereby ORDERED that the Motion for Summary Judgment of SBC Communications Inc., SBC International, Inc., and SBC International Latin America, Inc. be, and the same is hereby, GRANTED as to ATI's claims for tortuous interference with contractual relations and ATI's claims for violation of federal and Texas antitrust laws.

SIGNED this the [5th] day of August, 1998.

/s/ D.W. Suttle
D.W. SUTTLE
Senior United States
District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
W.D. TEXAS, SAN ANTONIO DIVISION

No. SA-96-CA-1064

ACCESS TELECOM, INC.,
PLAINTIFF,
v.
MCI TELECOMMUNICATIONS CORPORATION, ET AL.,
DEFENDANTS.

August 5, 1998

ORDER

SUTTLE, Senior United States District Judge.

Pending before the Court is the Motion for Partial Summary Judgment filed by Access Telecom, Inc. ("ATI") on August 11, 1997.[1] Also before the Court are the following documents:

1. The Response filed by the defendants MCI Telecommunications Corporation and MCI international, Inc. ("MCI") on August 26, 1997;[2]

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[1] Docket Entry No. 88.

[2] Docket Entry No. 106.

2. The Response filed by the defendants SBC Communications, Inc., SBC International, Inc., and SBC International Latin America, Inc. (" SBC") on September 4, 1997;[3]
3. ATI's Reply to SBC's Response filed by ATI on September 26,1997.[4]

Having reviewed the same, the pleadings and applicable law, the Court enters the followings order.

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The party moving for summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Burfield v. Brown, Moore & Flint, Inc.*, 51 F.3d 583, 588 (5th Cir. 1995). A fact is "material" if its resolution in favor of one party might affect the outcome of the action under governing law. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). No genuine issue of material fact exists if a rational trier of fact could not find for the nonmoving party based on the evidence presented. *National Ass'n of Gov't Employees v. City Pub. Serv. Bd.*, 40 F.3d 698, 712 (5th Cir. 1994).

To withstand a properly supported motion, the nonmoving party who bears the burden of proof at trial must come forward with evidence to support the essential elements of its claim. *Id.* (citing *Celotex Corp.*, 477 U.S. at 321-323). "[A] complete failure of proof concerning an essential element of the nonmoving party's case renders all other facts immaterial." *Celotex Corp.*, 477 U.S. at 323.

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[3] Docket Entry No. 114.

[4] Docket Entry No. 141.

The Court must consider all evidence in the light most favorable to the nonmoving party. *National Ass'n of Gov't Employees*, 40 F.3d at 712-713. "Conclusory allegations unsupported by specific facts, however, will not prevent the award of summary judgment." *Id.* at 713 (quoting *Anderson*, 477 U.S. at 249).

II. CHOICE OF LAW

In its motion for partial summary judgment, ATI seeks a ruling that its contracts and activities in providing the I-800 services to its customers were legal under Mexican and limited States laws. It also seeks a ruling that the acts of Telmex and MCI in disconnecting its I-800 service were illegal under Mexican law. SBC and MCI maintain that ATI's I-800 service was illegal under Mexican law and that Telmex's disconnection of ATI's I-800 service was legal under Mexican law.

As the parties recognize, Federal Rule of Civil Procedure 44.1 governs the procedure for determining an issue of foreign law. Rule 44.1 states:

> A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including, testimony, whether or riot submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

Fed.R.Civ.P. 44.1. ATI provided the requisite notice of its intent to raise an issue concerning the law of a foreign country in a pleading entitled "Notice of Intent to Rely Upon Foreign Law."[5]

ATI asserts that the Court must apply Texas law in determining the legality of its contracts with its customers because those contracts contain choice of law provisions which provide that the contract will be governed by the laws of Texas. SBC and MCI, while acknowledging the choice of laws provision, contend that Texas law should not be applied because to do so would be contrary to the fundamental policy of Mexico against resale of the I-800 service.

When parties to a contract reside or expect to perform their respective obligations in multiple jurisdictions, they may be uncertain as to what jurisdiction's law will govern construction and enforcement of the contract. To avoid this uncertainty, they may express in their agreement their own choice that the law of a specified jurisdiction apply to their agreement. Judicial respect for their choice advances the policy of protecting their expectations. This conflict of law concept is commonly referred to as party autonomy. *See* R. Weintraub, Commentary on the Conflict of Laws 269-271 (1971) ["Weintraub"].

Under the concept of "party autonomy," Texas courts respect the parties' choice of law unless the chosen law has no relation to the parties or the agreement, or their choice would offend the public policy of the states whose laws otherwise ought to apply. *Salazar v. Coastal Corp.*, 928 S.W.2d 162, 166 (Tex.App.--Houston [14th Dist.] 1996, no writ history) (citing *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677 (Tex. 1990), *cert. denied*, 498 U.S. 1048, 111 S.Ct. 755, 112 L.Ed.2d 775 (1991); *First Commerce Realty Investors v. K-F Land Co.*, 617 S.W.2d 806, 808-09 (Tex.Civ.App.--Houston [14thDist.], writ ref'd n.r.e.)). The party autonomy rule is codified in Texas in the Texas Business & Commerce Code, which provides:

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[5] Docket Entry No. 90.

> [W]hen a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or such other state or nation shall govern their rights and duties.

TEX.BUS. & COM.CODE Ann. §1.105(a) (Vernon Supp. 1989).

Texas has adopted Section 187 of the Restatement (Second) of Conflict of laws concerning contractual choice of law provisions. *DeSantis*, 793 S.W.2d at 677. Section 187 states:

> Law of the States Chosen by the Parties
>
> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> > (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
> >
> > (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of §188, would

> be the state of the applicable law in the absence of an effective choice of law by the parties.
>
> (3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

The issue before the Court—whether or not ATI's I-800 service was legal—is not "one which the parties could have resolved by an explicit provision in their agreement." Therefore, the Court must apply §187(2).

As noted, ATI and its customers chose the law of Texas to govern their contracts. However, Texas does not have a significant relationship to the parties. All of ATI's customers were in Mexico and the contracts were negotiated in Mexico. Moreover, the international long distance calls originated from Mexico. Thus, the Court finds that Mexican law should apply. Even if Texas were found to have a substantial relationship to ATI and its customers, the Court finds that the exception contained in §187(2)(b) applies. Whether the exception of §187(2)(b) applies depends upon three determinations: First, whether there is a state the law of which would apply under §188 of the RESTATEMENT absent an effective choice of law by the parties, or in other words, whether a state has a more significant relationship with the parties and their transaction than the state they chose; second, whether that state has a materially greater interest than the chosen state in deciding whether the agreement should be enforced; and third, whether that state's fundamental policy would be contravened by the application of the law of the chosen state. *De Santis*, 793 S.W.2d at 678. More particularly, the Court must determine: first, whether Texas has a more significant relationship to these parties and their transaction than Mexico; second, whether Texas has a materially greater interest than Mexico in deciding the legality of the I-800 service provided by ATI to its customers; and third, whether the application of Texas law in this case would be contrary to the fundamental policy of Mexico.

Section 188 of the RESTATEMENT provides that a contract is to be governed by the law of the state that "has the most significant relationship to the transaction and the parties," taking into account various contacts in light of the basic conflict of laws principles of section 6 of the RESTATEMENT. In the instant case, that country is Mexico. As previously noted, the contracts between ATI and its customers were negotiated and entered into in Mexico. The service was provided by ATI in Mexico. The customers of ATI were in Mexico. The place where ATI's I-800 service was blocked was Mexico. The customers of ATI were hurt in Mexico. Thus, it is Mexico, not Texas, which has an interest in protecting ATI's customers in Mexico. Finally, it is Mexico that has a strong public policy interest in its own telecommunication industry.

III. RULE 44.1

In determining Mexican law the Court is not bound by the evidence presented by the parties or by the Federal Rules of Evidence. Under Rule 44.1 "[t]he court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The Court's determination shall be treated as a ruling on a question of law." As recently explained by one district court,

> Rule [44.1] permits the court to consider any material that is relevant to a foreign-law issue, whether submitted by counsel or unearthed by the court's own research, and without regard to its admissibility under the rules of evidence.
>
> * * * *
>
> Since the new Rule dissipates former inhibitions, the court may consider any material

> the parties wish to present. Statutes, administrative material, and judicial decisions can be established most easily by introducing an official or authenticated copy of the applicable provisions or court reports supported by expert testimony as to their meaning. . . In addition to primary materials and expert testimony, a litigant may present any other information concerning foreign law he believes will further his cause, including secondary sources such as texts, learned journals, and a wide variety of unauthenticated documents relating to foreign law.

Arthur R. Miller, "Federal Rule 44.1 and the 'Facet' Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine," *65 Mich. L.R.* 613, 656-57 (1967) (footnotes omitted). *See also Atwood Turnkey Drilling v. Petroleo Brasileiro, S.A.*, 785 F.2d 1174, 1175 (5th Cir. 1989), *cert. denied*, 493 U.S. 1075, 110 S.Ct. 1124, 107 L.Ed.2d 1030 (1990); *Republic of Turkey v. OKS Partners*, 146 F.R.D. 24, 27 (D.Mass. 1993).

Under Rule 44.1 expert testimony accompanied by extracts from foreign legal material is the basic method by which foreign law is determined. *Republic of Turkey*, 146 F.R.D. at 27 (citing cases); 9 C. Wright & A. Miller, *Fed. Prac. & Proc.* §2444, at p. 646. An expert witness on foreign law is not required to meet any special qualifications and need not be admitted to practice in the country whose law is at issue. *See* 9 C. Wright & A. Miller, *supra*, at p. 646. Differences of opinion among experts on the content, applicability, or interpretation of foreign law do not create a genuine issue as to any material fact under Rule 56. *Banco de Credito Indus., S.A. v. Tesorreria General*, 990 F.2d 827, 838 (5th Cir. 1993), *cert. denied,* 510 U.S. 1071, 114 S.Ct. 877, 127 L.Ed.2d 73 (1994); John R. Brown, "44.1 Ways to Prove Foreign Law," 9 *Mar. Law.* 179, 194 (1984).

Although expert testimony is the most common way to determine foreign law, it is no longer "an invariable necessity in establishing foreign law, and indeed, federal judges may reject even the uncontradicted conclusions of an expert witness and reach their own decisions on the basis of independent examination of foreign legal authorities." *Curtis v. Beatrice Foods Co.,* 481 F.Supp. 1275, 1285 (S.D.N.Y.), *aff'd mem.,* 633 F.2d 203 (2d Cir. 1980) (citing Pollack, "Proof of Foreign Law," 26 *Am.J. of Comparative L.* 470, 474 (1978) (listing authorities)). The Advisory Committee Notes to Rule 44.1 state that the Rule

> provides that in determining [foreign] law the court is not limited by material presented by the parties; it may engage in its own research and consider any relevant material thus found. The court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail. On the other hand, the court is free to insist on a complete presentation by counsel.

Rule 44. 1, Advisory Committee Notes. *See also* 9 C. Wright & A. Miller, *supra,* at p. 646. In making its determination of foreign law the court may rely on foreign case law decisions, treatises, and learned articles, even if they are not generally admissible under the Federal Rules of Evidence. *Republic of Turkey,* 146 F.R.D. at 27 (citing cases).

Arbitration Between Trans Chem. Ltd. and China National Machinery Import and Export Corp., 978 F.Supp. 266, 275-76 (S.D.Tex 1997).

IV. UNDISPUTED FACTS

The undisputed facts show that on March 10, 1976, the Mexican federal government, via the Office of the Secretary of Communications and Transportation ("SCT"), granted Telmex an exclusive concession, effective for 30 years, for building, operating and exploiting a public telephone service network for Mexico. In 1990, the SCT modified that concession to give Telmex an exclusive concession for 50 years, beginning March 10, 1976.[6] That concession provides that a "subscriber" is "a user who has entered into a contract with Telmex for the use of any telecommunication service."[7] A "user", in turn, is defined as "an individual or corporation with temporary or permanent access to a public or private telecommunication service."[8] Under the concession, Telmex was required to sign a service contract with all its users which established the general service terms for the provision of services.[9] During the first six years of the concession, the termination of which was August 10, 1996, Telmex was not obliged to permit its users to resell "express circuit capacity" to provide basic long distance telephone service.[10] Meanwhile, the General Means of Communications Law[11] required anyone wishing to "exploit general routes of communications or any type of connected service" to obtain a concession or permit from the

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[6] *See* Amendment to the Concession of Telefonos, de Mexico, S.A. De C.V., attached as Tab F-5 to the Appendix to MCI's Motion for Summary Judgment.

[7] *Id*, Art. 1-1, Definition of Terms.

[8] *Id.*

[9] *Id.*, Art. 4-10.

[10] *Id.*, Art. 5-7.

[11] *See* Tab 3A of the Appendix attached to SBC's Response (Docket Entry No. 114).

SCT.[12] Neither a "general route" nor its connected services could be exploited without authorization by the SCT pursuant to regulatory provisions.[13] Entities rendering telecommunication services are defined in Art. V of the Reglamentos (Telecommunications Rulings) as "[i]ndividuals or corporations rendering telecommunications services holding a concession to install, operate and exploit a telecommunications network or having a permit to render telecommunications services using the networks given in concession to third parties."[14] Furthermore, the concession to exploit the network had to be carried out directly by its holder (Telmex) and its "commercialization" could be made through agents only in accordance with provisions approved by the SCT.[15]

On June 1, 1993, ATI entered into a contract with MCI for the provision of international 800 ("I-800") long distance service from Mexico to the United States for itself and as agent for various customers in Mexico.[16] In 1994, Telmex disconnected ATI's I-800 service as being an illegal resale of the I-800 service in violation of the concession granted to Telmex. In the instant motion for partial summary judgment, ATI argues that its service was legal and that Telmex had no right to disconnect it. Naturally, SBC and MCI counter that ATI's resell of the I-800 service was illegal under Mexican law. Both sides have proffered the affidavits of experts in support of their respective positions.

[Sections containing quotations of expert affidavits omitted.]

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[12] Id., Art. 8.

[13] Id., Art. 48.

[14] *See* Telecommunications Rulings of the Ministry of Communications and Transport, Art. V, attached as Tab 3B in the Appendix to SBC's Response.

[15] *Id.*, Art. 75.

[16] MCI had earlier contracted with Telmex for the provision of the I-800 service.

VII. ANALYSIS

The starting point to reaching an answer to the question of the legality or illegality of the service provided by ATI is deciding whether ATI was doing business in Mexico. If, as SBC and MCI contend, it was, then it was subject to the requirement that it first obtain authorization from Telmex to do so. However, if, as ATI insists, it was not doing business in Mexico, then ATI was free to provide its I-800 long distance service without first obtaining authorization from Telmex. For the reasons given below, the Court finds that ATI, by virtue of its I-800 long distance service, was engaged in business in Mexico and, consequently, was statutorily bound to obtain authorization from the SCT to do so.

ATI takes the position that it was not transacting business within Mexico through its I-800 service because that service only entailed it receiving the telephone calls from MCI at a switching point physically located within the United States and then routing the phone call on its lines to its final destination. Although this argument does have some initial appeal, it vanishes upon closer examination.

There is no dispute that ATI did not have a physical presence within the boundaries of Mexico. However, this does not dispose of the issue of whether it provided long distance services in Mexico. By ATI's own admission, it provided a service to residents of Mexico whereby they could dial a long-distance number that was originally carried on Telmex lines until it reached MCI at a switch point somewhere in the United States. MCI, in turn, relayed the call to ATI. When the call reached ATI, either a live operator or a voice-prompt computer asked the customer for his billing code and the number the customer in Mexico was trying to call. Once that information was received, the operator completed the call.

Although the Court is uncertain as to what appellation properly identifies ATI's service,[17] there is one thing as to which it is certain. That is the fact that no matter how ATI tries to fashion it, the service that it provided was a form of long distance service and the people it provided that service to were residents of Mexico. Although ATI attempts to focus the Court's attention on the physical aspects of the way the calls were transmitted and the absence of any physical presence by ATI in Mexico, the Court finds that this is not the proper point of inquiry. The critical point to the Court and one which ATI cannot deny, is that ATI provided a service to Mexican residents by which they could place long distance telephone calls from Mexico to points outside of Mexico. That ATI did not have its buildings, equipment, or people in Mexico is irrelevant. It still delivered a long distance service to residents of Mexico.

ATI having been found to be providing a long distance service to residents of Mexico at a time when Mexican regulatory law required it to have a permit or concession from the SCT to do so, it automatically follows that the failure of ATI to obtain such a permit or concession from the SCT for its long distance service rendered its operation unlawful under Mexican law.

Apparently in anticipation of this finding by the Court, ATI advances two theories of waiver of the permit requirement. First, it argues that Telmex waived the requirement by failing to include any restriction on the resale of its excess capacity in its service contracts with its users such as MCI. According to ATI, the absence of any ban on resale by the users meant that the users were free to resell the service to long distance provides such as ATI, regardless of whether they possessed a permit or concession from SCT.

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[17] The parties have squabbled about whether ATI's service was a "call back" service. Yet, despite submitting extensive briefs, neither party has bothered to define what a "call back" service is. However, as explained by the Court, the category of the long distance service is not crucial to resolving the issue.

The flaws in ATI's argument are several. First, it confuses the issue of whether or not a user could resell the service to a third party with the issue of whether the third party was required to have a permit or concession from the SCT. These are two entirely distinct and unrelated issues. The first concerns whether or not Telmex contractually prohibited its users such as MCI from reselling its excess capacity. If it did not, all this means is that the users had permission from Telmex to resell the service, However, it does not logically follow from this, as ATI seems to urge, that Telmex, by waiving its restriction on the resale of the excess capacity, somehow waived the SCT's requirement that the third-party user hold a concession or permit from the SCT. That is simply a *non sequitur.* ATI fails to explain, and this Court does not see how it would be possible for Telmex to waive this regulatory requirement. The only entity that could waive that provision would be the SCT, the Mexican regulatory agency responsible for the drafting and enforcement of regulations pertaining to the telecommunications industry in Mexico. ATI has presented no evidence that SCT could or ever did delegate that authority to Telmex. Therefore, this first waiver argument fails both as a matter of fact and law.

The other way by which the concession requirement was allegedly waived, ATI contends, was the acceptance of money by Telmex from MCI, a portion of which was the income derived by MCI from its contract with ATI. According to ATI, Telmex knew that part of the revenues it received from MCI was generated by MCI's resell of the long distance service bought from Telmex to ATI. Therefore, Telmex, by knowingly accepting the pecuniary benefit of income paid by ATI to MCI, implicitly consented to ATI's lease and use of the long distance service which

Telmex had sold to MCI. This argument, like the first one advanced by ATI, misses the mark.

As was the case with ATI's other waiver argument, this waiver argument is based on the actions of Telmex. However, as previously noted, there is no evidence that Telmex had any legal right to waive the SCT concession requirement. The only evidence of record is that the SCT was the sole holder of that right. Therefore, whether or not Telmex may have accepted income from MCI which was derived from ATI's use of the long distance service it leased from MCI has no bearing on the issue of whether the requirement of a concession was ever waived by the SCT. ATI has not adduced any evidence that the SCT ever did so.[18]

CONCLUSION

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[18] Brad Tirpak, president of ATI, claims in his affidavit that Alvarez Alonso, the director of Public Policy at SCT, stated in a letter to him that ATI's service was legal under Mexican law. However, ATI has failed to produce the letter as part of its supporting documents. The Court also notes that Tirpak does not state that Alonso told him that ATI's provision of the I-800 service without first obtaining a concession from SCT was legal.

Tirpak also claims that Jose Maria Rivas, the predecessor to Alonso, told him on three separate occasions that ATI's services were legal under Mexican law. Again, however, there is no assertion that Rivas ever told him that provision of the service without a concession from SCT was legal under Mexican law. Furthermore, as pointed out by the Court in its Order granting Telmex's Motion to Dismiss for Lack of Jurisdiction Over Its Person, Jose Rivas Moncayo testified at his deposition that he expressly told Tirpak that ATI must obtain a concession from the SCT in order for its service to be legal under Mexican law and that such a concession could not be obtained unless and until ATI had obtained Telmex's permission to provide long distance service in Mexico. Moncayo also testified that ATI was never issued a permit as long as he was the General Director of the Office of Communications Policies and Standards of the SCT. *See* Court Order of June 20, 1997 (Docket Entry No. 75), pp. 19-21.

Based on the above findings, the only conclusion that can be reached is that the provision of I-800 long distance telephone service to residents of Mexico by ATI without a concession from the SCT was not legal under Mexican law.

Accordingly, it is ORDERED that the Plaintiff s Motion for Partial Summary Judgment be, and the same is hereby, DENIED.

SIGNED this the [5th] day of August, 1998.

/s/ D.W. Suttle
D.W. SUTTLE
Senior United States District
Judge

APPENDIX F

UNITED STATES DISTRICT COURT
W.D. TEXAS, SAN ANTONIO DIVISION

No. SA-96-CA-1064

ACCESS TELECOM, INC.,
PLAINTIFF,
v.
MCI TELECOMMUNICATIONS CORPORATION, ET AL.,
DEFENDANTS.

June 23, 1997

ORDER

SUTTLE, Senior United States District Judge.

Pending before the Court is the Motion to Dismiss For Lack of Jurisdiction Over Its Person filed by defendant Telefonos De Mexico S.A. de C.V. ("Telmex") on October 11, 1996, the Response filed by Plaintiff, Access Telecom, Inc. ("ATI") on October 25, 1996, the Supplement of Telmex to its Motion to Dismiss filed on April 10, 1997, the Supplementary Response filed by ATI to its Response filed on April 23, 1997, the reply filed by Telmex to ATI'S a Supplementary Response on May 7, 1997, the Advisory to the Court filed by ATI on May 9, 1997, the Addendum to ATI's Supplementary Response filed on May 16, 1997, the Supplement to the Evidentiary Brief in Support of ATI's Supplementary Response filed on May 16, 1997, the Response filed by Telmex to ATI's Advisory to the Court filed on May 19, 1997, and Objection and Supplement to Plaintiff's Response in Opposition to Telmex's Motion to Dismiss for Lack of Jurisdiction Over Its Person filed on May 27, 1997.[1]

I. History of the Case

This lawsuit was originally filed by ATI against Telmex and the other defendants in the 73rd Judicial District Court, Bexar County, Texas on September 10, 1996. Therein ATI alleges, *inter alia,* that Telmex conspired with MCI Telecommunications Corp. and MCI International, Inc. ("MCI") to eliminate all I-800 telephone services provided by ATI from Mexico to the United States. The causes of action alleged by ATI against Telmex are for intentional interference with a contract between ATI and one or more of the MCI defendants, intentional interference with a contractual or business relationship between ATI and potential new customers, violations of §15.05(a) and (b) of the Texas Free Enterprise and Antitrust Act of 1983, §15.01 *et seq.* TEX.BUS. & COMM. CODE ("the Texas Antitrust Act), and violations of antitrust laws of the United States as defined in 15 U.S.C. §12.[2]

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[1] Docket Entry Nos. 6, 10, 59, 64, 65, 66, 67, 68, 69, and 70, respectively.

[2] Section 12 of Title 15, United States Code, provides as follows:

> (a) "Antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," approved February twelfth, nineteen hundred and thirteen; and also this Act.
>
> "Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State,

On October 4, 1996, MCI filed its Notice of Removal[3] pursuant to 28 U.S.C. §§1331[4] and 1337.[5] SBC Communications Inc., SBC International, Inc., and SBC International Latin America, Inc. filed a similar notice of removal that same day.[6] Telmex and MCI filed their joinder in that removal the same day.[7]

II. Argument and Analysis

Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the law of any of the Territories, the laws of any State, or the laws of any foreign country.

(b) This Act may be cited as the "Clayton Act".

The Acts referred to in §12 are the Sherman Act, 15 U.S.C. §§1-7, the Wilson Tariff Act, 15 U.S.C. §§8-11, and Act February 12, 1913, c. 40, 37 Stat. 667, as amended, which is classified to sections 8 and 11 of Title 15.

[3] Docket Entry No. 1.

[4] Section 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

[5] Section 1337 provides in pertinent part as follows:

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: *Provided, however*, that the district courts shall have original jurisdiction of an action brought under section 11706 or 14706 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

[6] Docket Entry No. 4.

[7] Docket Entry Nos. 2 and 3, respectively.

A. Go-Video "National Minimum Contacts" Analysis Applicable?

The initial argument advanced by ATI is that because Telmex is alleged to have violated the Clayton Act, which provides for worldwide service of process, this Court has personal jurisdiction over Telmex if Telmex has sufficient minimum contacts with the United States, citing *Go-Video, Inc. v. Akai Elec. Co., Ltd.*, 855 F.2d 1406 (9th Cir. 1989) and other cases. Telmex, while acknowledging that this is the law in the Fifth Circuit, argues that this analysis is not warranted in the instant case because ATI's antitrust violations all concern alleged efforts by Telmex to monopolize the 1-800 telephone service in Mexico. Therefore, Telmex asserts, because the antitrust laws of the United States do not regulate or redress allegedly monopolistic conduct in foreign countries by foreign companies, ATI does not have the requisite anti-trust claims needed to warrant utilization of the analysis. Instead, it must establish that Telmex is subject to either the specific personal jurisdiction or general personal jurisdiction of Texas courts under the traditional *International Shoe*[8] analysis. Naturally, resolution of this issue begins with an examination of ATI's antitrust allegation against Telmex.

ATI's amended complaint alleges, in pertinent part, as follows:

> 11. During or before 1992, TELMEX entered into an agreement with MCI INTERNATIONAL,

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[8] *International Shoe Co. v. Washington*, 326 U.. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). In *International Shoe*, the Supreme Court held that exercising personal jurisdiction over a nonresident does not violate due process principles if two requirements are satisfied. First, the nonresident defendant must have purposefully availed himself of the benefits and protections of the forum state by establishing "minimum contacts" with the forum state. 326 U.S. at 316, 66 S.Ct. at 158. Second, the exercise of jurisdiction over the nonresident defendant must not offend "traditional notions of fair play and substantial justice." *Id.*

INC. to provide international 800 (I-800) service from Mexico to the United States. MCI INTERNATIONAL, INC. provided this service to MCI TELECOMMUNICATIONS CORP. during and since 1992. MCI TELECOMMUNICATIONS CORP. advertised and offered for sale to its customers I-800 service for calls originating from Mexico, based on the services provided by TELMEX.

12. During 1993 and 1994, ATI contracted with MCI TELECOMMUNICATIONS CORP. for I-800 services from Mexico for itself and as agent for various customers. In addition to the I-800 service from Mexico, ATI offered a switching service carried out in Texas and elsewhere in the United States whereby customers could complete calls to a variety of U.S. 800 and other telephone numbers from Mexico. MCI represented to ATI that it had the authority and capacity to contract for telephone services through TELMEX between Mexico and the United States; that the proposed activity by ATI was within the terms of the tariff and in all respects a legal reuse of the services provided; that services would continue under the same legal terms in the future; that the rights and obligations of the parties under the contract were enforceable and that MCI would provide the same services in the future with special accommodations to ATI as its business increased. These and other promises and representations induced ATI to enter into an agreement with MCI and were a producing cause of damages to ATI.

13. The services offered by ATI used and paid for the use of TELMEX lines provided to MCI INTERNATIONAL. INC., then to MCI

TELECOMMUNICATIONS CORP. which were then sold under contract to ATI. Customers of ATI could save money on voice and facsimile calls between their Mexican offices and offices in the United States by the use of these services.

14. ATI expanded its business rapidly during 1994 and reached a revenue volume in excess of two million dollars per year. During middle and late 1994, TELMEX and/or SBC began a campaign to eliminate ATI as a source of potential competition, notwithstanding that the I-800 services offered by ATI were those very same services offered by MCI and that TELMEX was paid for each and every telephone call made through ATI. The auxiliary switching services offered by ATI allowed expanded use of the U.S. telephone system but all of these services were conducted within Texas and the United States.

15. During 1994, TELMEX and/or SBC demanded that MCI provide lists of its customers that were reselling the MCI I-800 services provided through TELMEX. The resale of the I-800 service offered by MCI was specifically authorized under the contract with ATI and under the MCI tariff. Eventually MCI provided a list of customers including ATI and its customers, whether or not ATI acted directly or only as agent for the customers under a letter of agency. MCI TELECOMMUNICATIONS CORP. and MCI INTERNATIONAL, INC. agreed and conspired with TELMEX and/or SBC to eliminate ATI as a potential source of competition by restraining its access to telephone communications completely, with regard to I-800 service from Mexico, which constituted the entire business of ATI.

> 38. The conduct of TELMEX and/or SBC further constitutes:
>
> a. a contract, combination in the form of trust or otherwise, and/or a conspiracy in restraint of trade or commerce among the several states or with foreign nations; and/or
>
> b. a monopoly, or attempt to monopolize, and/or a combination or conspiracy to monopolize a part of the trade or commerce among the several states, or with foreign nations.
>
> Such conduct is in violation of the Anti-Trust laws of the United States as defined in 15 U.S.C. §12.

See ATI's First Amended Complaint, pp. 3-8. Although ATI does not specifically cite them, the Court reads ATI's allegation as one for violations of Section 1[9] and 2[10] of the Sherman Act.

Section 1 of the Sherman Act prohibits conspiracy "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. §1. Section 2 of the Sherman Act prohibits monopolization and attempted monopolization "of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. §2. Although the Sherman Act applies to trade and commerce with foreign nations, it applies to foreign anti-trust conduct only to the extent that said conduct produces "some substantial effect in the United States." *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796, 13 S.Ct. 2891, 2809, 125 L.Ed.2d 612 (1993). Specifically, pursuant to §6a of the Sherman Act, anti-trust conduct involving United States export commerce with foreign nations is actionable only if said conduct has a "direct, substantial, and reasonably foreseeable effect" on one of the following: (1) on United States domestic commerce; (2) on United States import commerce; and (3) on export commerce only to the extent that such conduct injures export business in the United States. 15 U.S.C. §6a.

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[9] 15 U.S.C. §1.

[10] 15 U.S.C. §2.

As Telmex points out, all the activities of Telmex of which ATI complains occurred outside the United States. Moreover, the market from which ATI alleges to have been excluded by Telmex is the 1-800 service market in Mexico, outside the United States. Neither the fact that ATI is an American corporation nor that SBC and MCI are American corporations provide the requisite nexus with American trade that would bring the alleged illegal activity within the purview of the Sherman Act. *See Power East Limited v. Transamerica Delaval Inc.*, 558 F.Supp. 47, 49 S.D.N.Y. (1983) (Sherman Act claim of plaintiff, a Cyprus corporation, failed to state cause of action, where activities complained of all occurred outside United States, market from which plaintiff was supposedly excluded was outside the United States, and plaintiff made no suggestion of a "relevant market" in United states nor mentioned any American competitors; fact that principal shareholder of plaintiff was United States citizen and one of the defendants was a corporation organized within United States did not provide requisite nexus with American trade that would bring alleged illegal activity within purview of Sherman Act). *See also Optimum v. Legent Corporation*, 926 F.Supp. 530 (W.D.Pa. 1996) (holding that foreign corporation which marketed and distributed computer software products of American corporation in Argentina failed to establish that termination of its marketing contract by another foreign corporation resulted in anticompetitive effect on United States' domestic commerce, and thus district court lacked subject matter jurisdiction over corporate distributor's claim that termination of marketing contract violated Sherman Act; allegation that income flowed between corporations was insufficient to establish requisite domestic effect and distributor, a foreign corporation, could not maintain action under Sherman Act based merely upon injury to United States exporters attempting to enter Argentine computer software market).

As observed by the Court of Appeals for the Tenth Circuit:

> The principal purposes of the antitrust laws are protection of American consumers and American export and investment opportunities. If American interests are at stake we may impose liability for conduct outside our borders that has consequences within our borders. *See Alcoa,* 148 F.2d at 443. When the contacts with the United States are few, the effects upon American commerce minimal, and the foreign elements overwhelming, however, we do not accept jurisdiction. We believe that the analysis set forth in *Timberlane Lumber Co. v. Bank of America,* 549 F.2d at 613-15, contains the proper elements for consideration. To support jurisdiction of American court, plaintiff must first show that the challenged activity had an actual effect on United States commerce. Then we must decide if "the interests of, and links to, the United States--including the magnitude of the effect on American foreign commerce--are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority." *Id.* at 613.

Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864, 869 (10th Cir. 1981). In short, the antitrust laws of the United States do not regulate the competitive conditions of other nations' economies. *Matushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). *See also Industrial Inv. Develop. Corp. v. Mitsui & Co.,* 671 F.2d 876, 883 (5th Cir. 1982) (district court should not apply the antitrust laws to foreign conduct or foreign actors if such application would violate principles of comity, conflicts of law or international law).

In view of the fact that the conduct of Telmex all occurred in Mexico, that the market from which ATI claims to have been excluded is the I-800 service market in Mexico, and that the resultant economic consequences are felt predominately by Mexican consumers, the Court finds it does not have subject matter jurisdiction of ATI's antitrust claims against Telmex. Consequently, ATI must establish that this Court enjoys personal jurisdiction over Telmex under the more restrictive analysis of *International Shoe.*

B. *International Shoe "Minimum Contacts" Analysis*

This Court has personal jurisdiction over a nonresident defendant to the same extent that a Texas state court has such jurisdiction. *Bullion v. Gillespie,* 895 F.2d 213, 215 (5th Cir. 1990); Federal Rules of Civil Procedure, Rule 4(e). The reach of this jurisdiction is delimited by: (1) the state's long-arm statute; and (2) the Due Process Clause of the Fourteenth Amendment to the federal Constitution. *Bullion,* 895 F.2d at 215.

Because the Texas long-arm statute extends to the limits of federal due process,[11] the two-step inquiry is reduced to determining whether requiring Telmex to defend this lawsuit in Texas would encroach on its individual liberty interests—not to be subjected to suits in a distant forum with which it has little connection—that are safeguarded by the Due Process Clause.[12]

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[11] The Texas long-arm statute, Tex.Civ.Prac. & Rem.Code. Ann. §17.042 (Vernon 1986), authorizes the exercise jurisdiction over nonresidents "doing business" in Texas. The Texas Supreme Court has interpreted the "doing business" requirement broadly, allowing the long-arm statute to reach as far as the federal Constitution permits. *Schlobohm v. Schapiro,* 784 S.W.2d 355, 357 (Tex. 1990).

[12] The Due Process Clause provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, §1.

Exercising personal jurisdiction over a nonresident does not violate due process principles if two requirements are satisfied. First, the nonresident defendant must have purposefully availed himself of the benefits and protections of the forum state by establishing "minimum contacts" with the forum state. *Wilson v. Belin*, 20 F.3d 644, 647 (5th Cir.), *cert. denied*, -- U.S. --, 115 S.Ct. 322, 130 L.Ed.2d 282 (1994) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945)). Second, the exercise of jurisdiction over the nonresident defendant must not offend "traditional notions of fair play and substantial justice." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113, 107 S.Ct. 1026, 1033, 94 L.Ed.2d 92 (1987) (citing *International Shoe*, 326 U.S. at 316, 66 S.Ct. at 158).

The "minimum contacts" prong of this inquiry can be further subdivided into contacts that give rise to "specific" personal jurisdiction and those that give rise to "general" personal jurisdiction. Specific jurisdiction exists when the nonresident defendant's contacts with the forum state arise from, or are directly related to, the cause of action. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n. 8, 104 S.Ct. 1868, 1872 n. 8, 80 L.Ed.2d 404 (1984). General jurisdiction, on the other hand, will attach, even if the nonresident defendant's contacts with the forum state are not directly related to the cause of action, if the defendant's contacts with the forum state are both "continuous and systematic." *Helicopteros*, 466 U.S. at 414 n. 9, 104 S.Ct. at 1872 n. 9. In evaluating these contacts, it must be determined whether the defendant purposefully availed himself of the privilege of conducting activity in the forum state, thereby enjoying the benefits and protection of the forum's laws. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 2184, 85 L.Ed.2d 528 (1985).

If a nonresident defendant is found to have sufficient related or unrelated minimum contacts with the forum state, the Court must then ascertain whether the "fairness" prong of the inquiry is met. *See Asahi*, 480 U.S. at 105, 107 S.Ct. at 1033. The "fairness" of requiring a nonresident to defend a suit in a remote forum is a function of several factors, including the "interests of the forum State."[13] *Asahi*, 480 U.S. at 113, 107 S.Ct. at 1033.

When, as here, a nonresident defendant files a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing this Court's jurisdiction over the nonresident. *Stuart v. Spademan*, 772 F.2d 1185, 1192 (5th Cir. 1985). When the motion is ruled on without a hearing, the plaintiff may bear his burden by presenting a *prima facie* case that personal jurisdiction is proper. *Wilson*, 20 F.3d at 648. "Moreover, on a motion to dismiss for lack of jurisdiction, uncontroverted allegations in the plaintiff's complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits must be resolved in the plaintiff's favor for purposes of determining whether a *prima facie* case for personal jurisdiction exists." *Felch v. Transportes Lar-Mex, S.A. de C.V.*, 92 F.3d 320, 326 (5th Cir. 1996) (quoting Bullion, 895 F.2d at 217). In the event the Court finds that the defendant purposefully established sufficient minimum contacts with the forum, then the burden shifts to the defendant to present a "compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477, 105 S.Ct. at 2184-85.

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[13] The factors to be considered in the fairness inquiry are: (1) [T]he burden upon the nonresident defendant; (2) the interests of the forum state; (3) the plaintiff's interest in securing relief; (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"; and (5) "the shared interest of the several States in furthering fundamental substantive social policies." *Bullion*, 895 F.2d at 216 n. 5 (citing *Asahi*, 480 U.S. at 113, 107 S.Ct. at 1033 (quoting *World-Wide Volkswagen Corp v. Woodson*, 444 U.S. 286, 292, 100 S.Ct. 559, 563, 62 L.Ed.2d 490 (1980)).

i. The Collateral Estoppel or Res Judicata Effect of the State Court Ruling

The first matter that this Court must address is whether Telmex is precluded from litigating the personal jurisdiction issue before this federal tribunal by an order of a Texas state court denying Telmex's special appearance.

In its letter advisory to the Court[14] ATI advances the argument that an order by the 37th Judicial District Court, Bexar County, Texas denying Telmex's special appearance to contest jurisdiction in an action styled *Long Distance International, Inc., and Star Marketing Service, Inc. v. Telefonos de Mexico, S.A., et al*, NO. 96-CI-08912, is *res judicata* as to the issue of whether a Texas court enjoys general jurisdiction over Telmex and that Telmex is precluded from relitigating the issue in this case by the doctrine of collateral estoppel. Telmex responds that because the order denying its special appearance is an interlocutory order not subject to immediate appeal it is not a judgment for purposes of *res judicata* or collateral estoppel. Consequently, Telmex argues, it does not bar Telmex from litigating the issue of jurisdiction before this Court. As explained below, the Court finds ATI's argument untenable.

As both parties recognize, federal courts are required to give the same preclusive effect to state court judgments that such judgments would be afforded in the courts of the state from which the judgment originated. *Deckert v. Wachovia Student Financial Services, Inc.*, 963 F.2d 816, 817 (5th Cir. 1992) (citing *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 466, 102 S.Ct. 1883, 1889-90, 72 L.Ed.2d 262 (1982); *Superior Oil Co. v. City of Port Arthur*, 726 F.2d 203, 206 (5th Cir. 1984), quoting *Kremer*, supra; *Folsom Inv. Co. v. Moore*, 681 F.2d 1032, 1035 (5th Cir. 1982); *Coastal States*

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[14] Docket Entry No. 66.

Marketing v. Hunt, 694 F.2d 1358, 1373 (5th Cir. 1983) (citations omitted)). Therefore, the next analytical step is to examine the preclusive effect of the state court's order denying Telmex's special appearance.

Under Texas law "[t]he doctrine of res judicata states that a cause of action once finally determined, without appeal, between the parties, on the merits, by a competent tribunal, cannot afterwards be litigated by new proceedings either before the same or any other tribunal." *Texas Water Rights Commission v. Crow Iron Works*, 582 S.W.2d 768, 771 (Tex. 1979). "The doctrine of collateral estoppel differs in that it precludes relitigation of only those issues actually and finally decided in a prior action." *Hanrick v. Gurley*, 93 Tex. 458, 56 S.W. 330 (Tex. 1900).

Based on the above definitions, it is obvious that the state court order denying Telmex's motion to dismiss for lack of *in personam* jurisdiction does not satisfy the requirements necessary for application of the doctrine of *res judicata*. As Telmex points out, the state court order is an interlocutory order which only finds that the state court has jurisdiction over Telmex, not a judgment which passes on the merits of the causes of action asserted against Telmex. As such, it is not immediately appealable. *See Canadian Helicopters Ltd. v. Witting*, 876 S.W.2d 304, 307 (Tex. 1994) (because in the ordinary case no circumstances apart from the increased cost and delay of trial and appeal are present, mandamus typically will not lie from the denial of a special appearance). Therefore, Telmex is not precluded by the doctrine of *res judicata* from litigating the personal jurisdiction issue in this tribunal.

Having ruled out preclusion on the basis of *res judicata*, the Court must next determine whether the doctrine of collateral estoppel applies. In Texas, relitigation of an issue will be barred by collateral estoppel if "(1) the facts sought to be litigated in the first action were fully and fairly litigated in the prior action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action." *Mower v. Boyer*, 811 S.W.2d 560, 563 (Tex. 1991) (quoting *Eagle Properties v. Scharbauer*, 807 S.W.2d 714, 721 (Tex. 1991); *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984)). However, a prior adjudication of an issue will be given estoppel effect only if it was adequately deliberated and firm. The factors to be considered in making this determination are (1) whether the parties were fully heard, (2) that the court supported its decision with a reasoned opinion, and (3) that the decision was subject to appeal or was in fact reviewed on appeal. *Mower*, 811 S.W.2d at 562 (citing *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986); *Van Dyke v. Boswell, O'Toole, Davis & Pickering*, 697 S.W.2d 381, 385 (Tex. 1985); Restatement (Second) of Judgments §13, comment g (1982)).

As already mentioned, the state court's order is an interlocutory one which is not immediately appealable. Moreover, the order is not supported by a reasoned decision. In fact, the state court cites no specific reason in support of its ruling, but instead recites a general, non-specific litany for denying Telmex's motion.[15] Finally, ATI is not a party to the state court action from which the order emanated. Consequently, the order fails to satisfy two of the three elements essential to finding that it has collateral estoppel effect in the instant action.[16]

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[15] The state court order reads in its entirety as follows:

> On Wednesday, April 30, 1997, the Court considered defendant TELEFONOS DE MEXICO, S.A.'s special appearance. After considering the pleadings, the special appearance (sic), the response, affidavits, stipulations, and discovery on file, the arguments of counsel, and, after a hearing on the special appearance and receiving evidence, the court
>
> OVERRULES defendants special appearance and retains plaintiff's suit against TELEFONOS DE MEXICO, S.A. on the court's docket.

See Order on Defendant Telefonos De Mexico, S.A.'s Special Appearance, attached as Exhibit 4 to ATI's Letter Advisory to the Court (Docket Entry No. 66).

Accordingly, the Court finds that the state court order denying Telmex's special appearance does not act to collaterally estop Telmex from contesting the issue of whether this Court enjoys jurisdiction over its person in this action.

Having determined that the Texas state court order denying Telmex's special appearance does not fall under the doctrine of *res judicata* or the doctrine of collateral estoppel, the Court considers whether Telmex is amenable to the special or general personal jurisdiction of a Texas court.

ii. Specific Personal Jurisdiction

ATI contends that this Court has special personal jurisdiction for one reason. Specifically, ATI argues that Telmex purposely and wrongfully engaged in a course of conduct with MCI for the purpose of eliminating ATI from competition in the I-800 service in Mexico and that this intentional tort by Telmex caused damage to ATI in Texas by putting ATI out of business. Telmex counters that because everything it did was lawful under Mexican law no tort occurred, either in whole or in part, in Texas.

As support for its position, Telmex cites portions of the testimony given by Jose Rivas Moncayo at his oral deposition. Moncayo, who was, at all relevant times, the General Director of the Office of Communications Policies and Standards of the Ministry of Communication and Transportation,[17] testified as follows:

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[16] The Court also notes another dissimilarity between a special appearance in state court and the instant motion to dismiss for lack of personal jurisdiction. In the state court, a defendant seeking a special appearance pursuant to state Rule 120a, has the burden of proving a lack of jurisdiction. On the other hand, in federal court the burden of proof is on the party seeking to acquire jurisdiction. *Lapeyrouse v. Texaco, Inc.*, 693 F.2d 581, 563 n. 3 (5th Cir. 1982).

Q. Under the legal nature and complementary law you described, did Access Telecom, Incorporated have authorization to offer international telephone service in Mexico?

A. No, they did not have it.

Q. Because Access Telecom, Incorporated did not have authorization from Telefonos de Mexico to offer international telephone services, would their offering of international telephone service in Mexico be a violation of Mexican law?

TRANSLATOR: A violation of what?

MS. BURCHUCK: Mexican law.

A. It was illegal to give those services.

Dep. of Jose Rivas Moncayo, p. 14.

Q. During the relevant period, Access Telecom was not authorized to offer international telephone service in Mexico; was it?

A. They were not authorized.

TRANSLATOR: That's the answer.

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[17] *See* Deposition of Jose Rivas Moncayo, p. 7, lines 1-20, attached as Ex. "C" to ATI's Response. That agency is the Mexican government's equivalent to the United States Federal Communications Commission. *See* Deposition of John H. Atterbury, p. 25, lines 8-21, attached as Ex. "B" to ATI's Response to Telmex's Motion to Dismiss for Lack of Jurisdiction (Docket Entry No. 10).

BY MS. BURCHUK:

Q. Since Access Telecom was not authorized, was--

JUDGE JARAMILLO: Do you mind repeating your question?

MS. BURCHUK: Sure.

BY MS. BURCHUK: Since Access Telecom was not authorized to offer international telephone service in Mexico, if it offered those services, would it have been engaging in a practice illegal in Mexico?

A Yes, in fact. It's a fact.

Id., p. 19, line 22-p. 20, line 12.

Q. Did you meet with Mr. Tirpak when you were the general director of the office of communication policies and standards?

A. Yes, I did. I did.

Q. During your meeting with Mr. Tirpak, did he describe the services offered by Access Telecom, Incorporated?

A. I suppose he did because they were requesting a permit in order to do so.

Q. Do you recall how he described Access Telecom's services?

A. In fact, it was the same nature as a service named in telecommunications is called call-back.

Q. By same nature, do you mean a service offered by a company that was not authorized to offer international telephone service in Mexico?

A. That person went because he wanted to get a permit for that service. I did not give the permit. Stated that he should go to Telmex to come to an agreement with them. Otherwise it would be impossible.

MS. BURCHUK: I'm going to need you to answer the question that I asked before and the court reporter will read it back.

(Following question read by reporter. By same nature, do you mean a service offered by a company that was not authorized to offer international telephone service in Mexico?)

A. Yes, it's a service which was not authorized.

Id., p. 23, line 3-24; p. 24, 1-9.

Q. Do you recall making any statements to Mr. Tirpak, from which he would have concluded that Access Telecom had not broken any current Mexican law or regulations?

A. I remember having told him that he was violating a law and the procedure in order to get a permit was through a previous agreement with Telmex. If he could show me that agreement, I could give him the permit; and that never happened.

Id., p. 27, lines 13-21.

Q. I hope so. Should be. In your last answer you stated that a company had to be authorized to resell Telefonos de Mexico service. Did Access Telecom ever receive this authorization?

A. They never received it. While I was the person responsible, they never received it. They never granted a permit for long distance service while I was responsible.

Q. Was that during the time you were director general?

A. Obviously, yes.

Id., p. 32, lines 2-11.

ATI has proffered no evidence to discredit Moncayo or refute his testimony that Mexican law prohibits ATI from entering the I-800 telephone service in Mexico without first obtaining authorization from Telmex to do so. Therefore, the Court must accept Moncayo's testimony as true. In so doing, the Court not only finds that ATI could not, under Mexican law, enter the I-800 telephone service market in Mexico without first obtaining authorization from Telmex, but that any attempt by ATI to do so, whether directly or indirectly by contracting with MCI, was in violation of Mexican law.

As noted earlier, ATI's tort claim against Telmex is one for tortious interference with ATI's contract with MCI for resale of I-800 telephone service MCI had purchased from Telmex. Under Texas law, a plaintiff establishes a case of wrongful interference with a contract by showing that : (1) a contract existed that is subject to interference; (2) the act of interference was willful and intentional; (3) such intentional act was a proximate cause of the plaintiff's damages; and (4) actual damage or loss occurred. *Central Savings and Loan*

Association, 848 S.W.2d 232, 241 (Tex.App.--Dallas 1992, no writ) (citing *Futerfas v. Park Towers*, 707 S.W.2d 149, 161 (Tex.App.--Dallas 1986, writ ref'd n.r.e.)). The general rule is that for there to be a right of action against one for contractual interference, there must be in existence a valid contract. *Spellman v. Lyons Petroleum, Inc.*, 709 S.W.2d 295, 298 (Tex.App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.) (citing *Armendariz v. Mora*, 553 S.W.2d 400,404 (Tex.Civ.App.--El Paso 1977, writ ref'd n.r.e.)). There is no remedy for tortious interference with a contract contrary to law and public policy. *Ben E. Keith Co. v. Lisle Todd Leasing, Inc.*, 734 S.W.2d 725, 727 (Tex.App.--Dallas 1987, writ ref'd n.r.e.). *See also Crowder v. Benchmark Bank*, 889 S.W.2d 525 (Tex.App.--Dallas 1994) (Texas courts do not enforce illegal contracts), *modified on other grounds*, 919 S.W.2d 657 (Tex. 1996). In light of the Court's finding that Mexican law does not allow ATI to repurchase the I-800 service from MCI or anyone else without first obtaining Telmex's permission to do so and that ATI never obtained such authorization from Telmex, ATI is unable to establish the existence of a valid contract which this Court can enforce.

Accordingly, the Court finds that it does not enjoy specific personal jurisdiction over Telmex.

iii. General Personal Jurisdiction

Specific personal jurisdiction over Telmex having been eliminated, the Court is left only with the question of whether Telmex is subject to its general personal jurisdiction. ATI submits that the following systematic and continuous contacts by Telmex with Texas render it amenable to the general personal jurisdiction of a Texas court:

1. Ten percent of Telmex is owned by Southwestern Bell Corporation (SBC), a Texas corporation, through a subsidiary.

2. At least one member of the board of directors of Telmex, John Atterbury, is a United States citizen and is domiciled in Texas.
3. Telmex began providing telephone service between Dallas, Texas and Mexico pursuant to a contract it signed with AT&T in 1977, which was a continuation of an agreement entered into by the two companies in 1952.
4. In 1967, Telmex began to lease telephone lines and telephone circuits (normally 24 lines) between Nogales, Arizona and El Paso, Texas, an arrangement which continued and expanded through 1975.
5. In 1989, Telmex began leasing telephone circuits from MCI in the United States from the Texas border at El Paso, McAllen and Laredo to Manahawkin, Philadelphia, and Miami.
6. Beginning in 1967, Telmex leased telephone circuits to American companies including 98 voice grade circuits from the United States, through Mexico, to Guatemala.
7. Starting in 1993, Telmex began purchasing consulting services from its partner SBIH, a subsidiary of SBC communications, which is a Texas corporation.
8. Telmex has an existing correspondent relationship with MCI pursuant to which MCI sells regular phone service, I-800 service and private line service for Telmex in Texas.
9. SBC, Telmex's partner in Texas, specifically agreed to be held liable by United States courts for certain actions of Telmex when purchasing the company in accordance with an order of the U.S. District Court for the District of Columbia. Also, Telmex agreed to abide by the order of that Court so as to allow

SBC and its partnership to purchase a controlling interest in the voting shares of Telmex.

10. When Telmex took SBC as a partner it implicitly agreed to the Modified Final Judgment of Judge Green by changing its articles of incorporation and further agreed to abide by the orders of the U.S. District Court.
11. Telmex has leased property, paid taxes and owned personal property in Texas.
12. Telmex's telecommunications lines cross into Texas and terminate on the border in Laredo and McAllen.
13. Telmex receives a large amount of its revenues from the provision of I-800 services to Texas residents.
14. Starting in 1993, Telmex has purchased consulting services from its partner Southwestern Bell International Holdings (SBIH), a subsidiary of SBC communications, a Texas corporation.

With regard to the leasing of property and paying of taxes in Texas, the lease[18] to which ATI refers was executed by Telmex in June of 1995. Likewise, the taxes were paid in 1996.[19] The events giving rise to the instant lawsuit occurred, according to ATI's First Amended Complaint, in 1994. Therefore, that transaction cannot be relied on by ATI for purposes of establishing that Telmex had sufficient minimum contacts with Texas so as to make it amenable to the jurisdiction of Texas courts prior to the events giving rise to the instant lawsuit. *See, e.g., Farmers*

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[18] *See* Evidentiary Brief in Support of ATI's Supplementary Response to Telmex's Motion to Dismiss (Docket Entry No. 64) (hereinafter "Evid. Br."), Tab 36.

[19] Evid. Br., Tab. 37.

Ins. Exch. v. Portage La Prairie Mut. Ins. Co., 907 F.2d 911, 913 (9th Cir. 1990) (in personal jurisdiction analysis, "[o]nly contacts occurring prior to the event causing the litigation may be considered); *Toshiba Funding Authority Ltd. v. Somerset Marine*, 923 F.Supp. 982, 986 (S.D. Tex. 1996).

With regard to its reliance on Telmex's entering into a consulting agreement with SBIH from 1991-1995, ATI fails to show how this constitutes the systematic and continuous contacts with Texas necessary to assert general personal jurisdiction over Telmex. As evidenced by the contracts themselves, SBIH is a Delaware corporation with its principal place of business in Wilmington, Delaware.[20] That SBIH is a subsidiary of SBC, a Texas corporation, is an inadequate basis for finding that Telmex, by hiring SBIH as its consultant, had contacts with Texas.

Next, ATI asserts that Telmex, by entering into contracts with Sprint, MCI,[21] AT&T,[22] and IDB,[23] pursuant to which Telmex agreed to provide telecommunication services to and from the Mexico-Texas border, served to create a principal and agent relationship between Telmex and MCI, Sprint and AT&T in which MCI, Sprint and AT&T act as agents for Telmex within Texas, citing *Garver v. Howard*, 113 Tex. 371, 257 S.W. 209 (1923) and *Farmers State Bank in Merkel v. U.S.*, 62 F.2d 178 (5th Cir. 1932) as support. Consequently, ATI argues, Telmex has the requisite systematic and continuous contacts with Texas for this Court to assert its general personal jurisdiction over Telmex.

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[20] Evid. Br., Tab 26a-26h.

[21] The corresponding agreement with MCI and Sprint have been in effect since 1990. *See* Evid. Br. Tab 16 and Tab 14, respectively.

[22] The corresponding agreement with AT&T has been in effect since 1952. *See* Evid. Br., Tab 8.

[23] The Court is unable to locate the corresponding agreement between Telmex and IDB among the exhibits attached to the Evidentiary Brief of ATI.

Telmex responds that these contracts merely allow Telmex to interconnect with the United States carriers to allow them to utilize Telmex's network in Mexico to complete calls in Mexico and vice versa. As explained below, this Court finds that Telmex does not have systematic and continuous contacts with Texas by virtue of these corresponding agreements.

As Telmex points out, all the correspondent agreements it has with Sprint, MCI, AT&T and IDB merely provide that Telmex will transmit incoming calls from the United States into Mexico via equipment that switches the incoming calls from the lines of the American carrier to Telmex's networks and, conversely, that the American carriers will perform the same service for outgoing calls from Mexico into the United States. ATI has offered no evidence that these corresponding agreements call for any of the American carriers to act as Telmex's agent within Texas or the United States. As for ATI's reliance on *Garver* and *Farmers' State Bank in Merkel*, the Court finds such reliance misplaced.

In *Garver*, the San Antonio Grain Company sued Louis Garver, to whom it had sold a car of corn, State Bank & Trust Company, to whom it had delivered a draft drawn on Garver and a bill of lading for collection, and Continental State Bank, to whom State Bank had forwarded the papers for collection, to collect on the unpaid draft. The question of law certified to the Texas Supreme Court by the Court of Civil Appeals was, as framed by the Texas Supreme Court, "[w]hether, under the facts stated, the Continental State Bank was the agent of the State Bank & Trust Company (the forwarding bank), or of the owner of the paper (San Antonio Grain Company), or, abstractly stated, whether a correspondent bank, to which another bank has sent a customer's negotiable paper for collection, is the agent of the forwarding bank or of the owner of the paper, and whether the forwarding bank may be held for the negligence of its correspondent bank." *Garver*, 257 S.W. at 210. Based on the reasoning in *Tillman County Bank of Grandfield, Okl. v. Dell Behringer*,[24] another case decided by it the same day, the Supreme Court answered the question in the negative. *Id.* ATI fails to explain how this holding, which was concerned with determining whether or not a principal-agent relationship arose between a forwarding bank and a correspondent bank to whom the correspondent bank transferred a customer's negotiable papers for collection, has relevance to the facts of this case. Here, the only evidence is that Telmex, pursuant to the correspondent contracts, pays the American carriers a portion of the moneys it collects from its I-800 customers in Mexico for carrying the I-800 calls from the Mexico-Texas border to the receiving customer in the United States. In fact, if one were to view the Mexican customers, Telmex and the American carriers in terms of the bank customers, the forwarding bank, and the correspondent bank, respectively, involved in *Garver* and applied the rationale and holding of that case, then the American carriers (correspondent banks) would be the agents of the Mexican customers (bank customers), not of Telmex (the forwarding bank). *See also Philadelphia & R.R. Co. v. McKibbin*, 243 U.S. 264, 37 S.Ct. 280, 61 L.Ed. 710 (1917) (a railroad company no part of whose tracks enter a state is not doing business therein merely because of the fact that its cars are shipped back and forth in and out of the state over the lines of a connecting carrier on coupon tickets issued by the initial carrier, the revenue from which is proportionately divided).

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[24] In *Behringer*, the Texas Supreme Court held that a correspondent bank, to which another bank has forwarded a customer's negotiable papers for collection, is an agent of the owner of the paper and not of the forwarding bank, and the correspondent bank's negligence does not render the forwarding bank liable to the owner of the paper. 257 S.W. 206.

Accordingly, the Court finds that Telmex has not had, by virtue of its correspondent contracts with AT&T, Sprint and MCI, systematic and continuous contracts with Texas so as to render it amenable to the general personal jurisdiction of a Texas court.

ATI next asserts that Telmex is subject to the general jurisdiction of Texas by reason of it having contracted with Housley Communications, a Texas corporation, for delivery of telephone poles and by storing the poles in Laredo, Texas. Telmex responds that ATI has offered no evidence that the poles were stored in Laredo at the request of Telmex. Moreover, this purchase was a single event and therefore cannot serve as a basis for asserting general personal jurisdiction over it.

Initially, the Court notes that ATI's reference to the transcript of the oral deposition of Alejandro Coca Sanchez as Tab 27 is incorrect. Tab 27 is the transcript of the deposition of Armando Corona Perez. The transcript of the Sanchez deposition is attached as Tab 35. Furthermore, the document attached as Tab 28 is not the agreement between Telmex and BMF for the purchase of the telephone poles, but instead is an escrow agreement entered into between Telmex and World Trading Corp of Houston, Inc. concerning the settlement of a dispute over the telephone poles. The "Agreement" referred to in Section 5 of that document is the escrow agreement, not the purchase agreement for the telephone poles.

As far as this Court can ascertain from its review of the cited portions of the Perez deposition transcript, Telmex purchased approximately 75,000 telephone poles from BMF Corporation in 1990.[25] Apparently, the poles were later stored in Laredo, Texas. However, there is no evidence that this Court can find to indicate who directed that the poles be stored in Laredo. As Telmex points out, Perez stated in his deposition that he himself did not know if the poles had been stored in Laredo. Furthermore, although the attorney questioning Perez refers to the purchase agreement between Telmex and World Trading as Exhibit No. 5 in questioning Perez as to the storage of the poles in Laredo, the document attached as Exhibit 5 to the Perez deposition[26] is not the purchase agreement. Instead, it is the escrow agreement mentioned by the Court in the above paragraph. Given this, the Court finds that the one time purchase of telephone poles by Telmex is not enough to invoke the general personal jurisdiction of this Court.

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[25] *See* Evid. Br., Tab 27, the Oral Deposition of Armando Corona Perez, pp. 18-22, and Tab 28, the escrow agreement between Telmex and

ATI next attempts to establish general personal jurisdiction over Telmex on the ground that John Atterbury, one of the members of the board of directors of Telmex, is a United States citizen and is domiciled in Texas. However, the mere presence of officers or agents of a foreign corporation within the state is not sufficient to constitute a doing of business for purposes of jurisdiction. *See Turner v. Jack Tar Grand Bahama, Ltd.*, 353 F.2d 954 (5th Cir. 1965) (mere residence of officers and directors of foreign corporation in Texas, together with holding of conferences in that state regarding foreign corporation's business operations, insufficient to prevent application of rule that solicitation alone is insufficient basis for in personam jurisdiction).

ATI also asserts that Telmex has exposed itself to the general personal jurisdiction of Texas because SBC, Telmex's partner in Texas, agreed to be held liable by

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World Trading Corp. of Houston, Inc. Apparently, World Trading Corp. of Houston, Inc., a Texas corporation, succeeded to BMF's interest.

[26] This document is labeled as Tab 28 in the exhibits attached to ATI's evidentiary brief.

United States courts for certain actions of Telmex when purchasing the company in accordance with an order of the U.S. District Court for the District of Columbia. Furthermore, Telmex agreed to abide by the order of that court so as to allow SBC and its partnership to purchase a controlling interest in the voting shares of Telmex. Finally, ATI argues, Telmex, when it took SBC as a partner, implicitly agreed to the Modified Final Judgment entered by Judge Green. As support for this argument, ATI cites the Court to Tab 51, Bates #10190 & 10186 and the deposition of Lic. Jose Manuel Camacho Berrueta, attached as Tab 26, p. 46.

According to ATI, the testimony of Berrueta on which it relies for its assertion that SBC is a partner of Telmex reads as follows:

> Q. SBCI is a shareholder in Telmex, correct?
>
> A. I am not sure of the social name or what, but Southwestern Bell is a partner of Telefonos de Mexico. they are owners of part of the shares in Telefonos de Mexico.

However, the Tab 26 attached to ATI's Evidentiary Brief does not contain page 46 from Berrueta's deposition. Therefore, the Court has no way of assessing merit, if any, of this particular argument.

ATI next asserts that Telmex has sufficient minimum contacts with Texas to fall under its general personal jurisdiction because it began providing telephone service between Dallas, Texas and Mexico in 1977 pursuant to a contract it signed with AT&T, which was a continuation of an agreement the two companies entered into in 1952. However, after reviewing the two contracts,[27] the Court finds that the terms of this agreement are similar to the earlier discussed correspondent agreements Telmex has with MCI and Sprint. Therefore, for the same reason that those agreements were found not to bring Telmex within the general personal jurisdiction of Texas courts, so too is this agreement with AT&T found inadequate to bring Telmex within its grasp.

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[27] Evid. Br., Tabs 8 and 12.

ATI next attempts to establish that Telmex is amenable to the general personal jurisdiction of Texas courts on evidence that SBC has a controlling interest in Telmex. However, as ATI points out in its reply, ATI has misrepresented the facts. ATI cites Tab 23, p. 16, in support of its assertion that SBC has a controlling interest in Telmex. Tab 23, p. 16, however, reads, in pertinent part as follows:

> ITEM 4. CONTROL OF REGISTRANT
>
> On December 20, 1990, the Government, which previously owned a majority of the Company's capital stock, sold all of the AA Shares, representing 20.4% of the total capital stock of the Company, but a majority of the full voting shares, to a trust for the benefit of a group of investors (the "Controlling Shareholders") led by Grupo Carso, S.A. de C.V. ("Carso") and subsidiaries of Southwestern Bell Corporation (currently known as SBC Communications Inc.) and the French state-owned telecommunications agency France Telecom. It also sold to certain of the controlling shareholders options, which have since been exercised, to acquire 5-41 million L Shares.[28]

Thus, SBC does not by itself own a controlling interest in Telmex. Rather, it is one of several members of a group which holds a majority of the full voting shares in Telmex. Regardless, the fact is that Telmex cannot be said to have taken any action in Texas by virtue of the fact that it offered its stock for sale in Texas. *See Nordic Bank PLC v. Trend Group, Ltd.*, 619 F.Supp. 542 (S.D.N.Y. 1985) (marketing in excess of $100 million of commercial paper by foreign companies through New York brokerage firms did not compel finding that companies were "doing business" in New York within meaning of New York jurisdiction statute, where notes were not sold directly by foreign companies to the public but rather were sold to New York commercial paper dealers who then reoffered them to United States investors; even if foreign companies' marketing of commercial paper through New York brokerage firms constituted "doing business" within meaning of New York jurisdiction statute, jurisdiction was nevertheless lacking where they lacked the traditional indicia of doing business in New York, and where cause of action against them did not arise out of those sales). Inasmuch as Telmex lacks the traditional indicia of doing business in Texas and the instant cause of action does not arise from the sale of the stock to SBC, the Court finds that Telmex has not, by selling its stock to SBC, engaged in business in Texas so as to fall under its long-arm jurisdiction.

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[28] Evid.Br., Tab 23, p. 16.

ATI also cites to Telmex having leased circuits from MCI and AT&T in the United States from the Texas border at El Paso, McAllen and Laredo to Manahawkin, Philadelphia, and Miami as evidence that Telmex has sufficient minimum contacts with Texas to justify subjecting it to the general jurisdiction of its courts. ATI cites to Tab 4 and 11 as evidence of these lease agreements. However, Tab 4 is a letter from C. C. Zacha, Manager Director of AT&T, to Hector Carlos Davila, Subdirector of Promotions & Development at Telmex, in which he discusses an agreement to make USADirect Service available from the cities of Cancun, Ixtapa, Puerto Vallarta and Acapulco by June 1, 1989. Tab 11, meanwhile, is a letter dated July 12, 1967 discussing Telmex leasing from AT&T 30 circuits between Nogales, Arizona and El Paso, Texas for service between points in Mexico starting in mid-1968. Nowhere in either document is mention made of Telmex providing telephone service from Texas to Miami, Manahawkin, or Philadelphia.

The next evidence cited by ATI as proof of Telmex having sufficient systematic and continuous contacts with Texas to render it subject to the general jurisdiction of Texas courts is its lease of telephone lines and telephone circuits between Nogales, Arizona and El Paso, Texas since 1975. However, as noted above, the letter designated as Tab 11 concerns the lease by Telmex of 30 circuits "through the United States between Nogales, Arizona and El Paso, Texas for service between points in Mexico. . . ." As this Court understands it, this lease agreement is not materially different than the earlier-discussed correspondent agreements. In the latter, Telmex is paying AT&T for completing calls carried by Telmex to the Mexico-United States border and then switched to the American carriers lines to be carried to its American destination. In the former, it appears that AT&T is merely supplying the 30 circuits between Nogales, Arizona and El Paso, Texas to Telmex to complete calls originating in one point in Mexico and destined to another point in Mexico. Thus, this arrangement with AT&T can no more be viewed as Telmex engaging in systematic and continuous contacts with Texas anymore than the correspondent contracts could be so viewed.

ATI next argues that Telmex has the requisite minimum contacts with Texas to warrant a Texas court exercising personal jurisdiction over it as a result of it leasing telephone circuits to American companies from the United States, through Mexico, to Guatemala since 1967. However, Tabs 2, 12, and 19a, which ATI cites as supporting documentation, do not evidence any such agreement. First, there is no Tab 19a. Moreover, neither Tab 2, p.3,[29] nor Tab 12, p. 5,[30] mentions the provision of telephone circuits

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[29] Tab 2, p. 3, reads as follows:

> whichever date occurs first. Such equipment shall be used by Telmex solely to provide joint telecommunication services with AT&T.
>
> 3. AT&T shall provide equipment utilizing the North American standard digital hierarchy (i.e., 1.544 Mb/s, 6.312 Mb/s, 44.736 Mb/s and 139.264 Mb/s). AT&T shall provide to Telmex such quantity of multiplex equipment as the parties agree is necessary to accommodate the jointly approved telecommunications traffic requirement for private line and message service between San Diego and Tijuana during the time period that Telmex is entitled, under this Agreement, to use such multiplex equipment. Provided specifically, however, that when the TAT-8 hybrid multiplex equipment becomes available from a vendor acceptable to both parties, AT&T shall not be under any obligation to continue to provide the North American Standard multiplex equipment. Telmex shall accept and utilize the North American standard digital hierarchy during its use of the AT&T-provided equipment under this Agreement.
>
> 4. As part of the multiplexing arrangement, Telmex shall provide, from its inventory, the necessary channel banks associated with the multiplex equipment provided by AT&T. If Telmex's existing Tijuana inventory of seven channel banks is exhausted during the time period that Telmex is entitled to use the subject multiplex equipment, then AT&T shall provide to Telmex all channel banks necessary to accommodate the jointly approved traffic requirements during the remainder of that time period.

Id.

[30] Tab 12, p. 5, reads as follows:

> - The facility planning meetings in which circuit groups and traffic routing will be established.
> - Crossborder trunking plans mutually agreed upon by both parties.
>
> I.
>
> Both companies agree to work toward a system of alternate routing which uses a group of trunks between Dallas and Mexico, D.F. as the single final route between their respective networks with a loss probability of 1%. Direct high usage circuit groups connecting the networks may be provided between any two points whenever the mutual traffic generated by these two points and their subordinate areas warrants the provision of 12 or more circuits. The provisions of new circuit groups shall be mutually agreed upon in the context of the facility planning meeting and should be made in groups of 12 (12, 24, 36, etc.) circuits. Circuit groups which would ordinarily be classified as direct

between the United States and Guatemala by Telmex. Accordingly, this argument fails.

ATI further contends that Telmex has made itself susceptible to the general personal jurisdiction of Texas courts because it receives a large portion of its revenues from the provision of I-800 services to Texas residents. However, as this Court explained earlier, the revenue to which ATI refers is generated by Telmex providing to American carriers such as MCI and Sprint its circuits which are contained within the borders of Mexico to complete incoming calls from the United States. Telmex does not perform any of this service within the boundaries of Texas. Consequently, that Telmex derives a large portion of its revenues from the provision of such services cannot be relied on for the assertion of personal jurisdiction over it by this Court.

The final basis on which ATI attempts to establish that Telmex is subject to the general personal jurisdiction of Texas courts is the fact that Telmex telecommunications lines cross the Texas border and terminate in Laredo and McAllen. The evidence offered by ATI in support of this assertion is the affidavit of Bradley Tirpak. Therein, Tirpak avers as follows:

> 3. Telmex markets telephone services to certain international providers, including MCI International, Inc. ("MCII"). MCII vends those services through MCI Telecommunications Corporation ("MCIT") in Texas and throughout the

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high usage groups may also be engineered for low blocking probability and without overflow to any other group.

Where such groups are established they substitute for part of the normal final routes only for the traffic streams for which they are respectively intended. Such groups shall be established only by mutual consent when and where special circumstances exist.

Id.

> United States. Telmex's telecommunication lines cross into Texas and Laredo and McAllen. Calls which cross at these points are then switched at MCIT's switching facility in San Antonio. MCII, in cooperation with Telmex, utilizes these facilities to provide service throughout Texas and the United States. Telmex receives revenue from every call which uses these facilities.

See Affidavit of Bradley Tirpak, attached as Ex. A to ATI's Response to Telmex's Motion to Dismiss for Lack of Jurisdiction Over Its Person (Docket Entry No. 10). Although Telmex has not directly controverted Tirpak's affidavit, a review of the corresponding agreement that Telmex has with MCI shows that Telmex only runs its circuits into Laredo and McAllen so that they may connect with MCI's switching circuits.[31] Therefore, the Court finds that this contact by Telmex with Texas is, although continuous, not of sufficient significance to bind Telmex to its jurisdiction.

CONCLUSION

Based on the above findings of fact and conclusions of law, the Court finds that it does not have jurisdiction over the person of the defendant Telefonos de Mexico S.A. de C.V.

Accordingly, it is ORDERED that the Motion of Defendant Telefonos de Mexico, S.A de C.V. to Dismiss for Lack of Jurisdiction Over its Person be, and the same is hereby, GRANTED and that the defendant Telefonos de Mexico, S.A. de C.V. be dismissed as a party to this action.

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[31] *See* Evid. Br., Tab 17, p.4, which shows that the border crossing points are "Nogales/Tucson, Cd. Juarez/El Paso, Reynosa/McAllen, and Tijuana/San Diego."

SIGNED this the [20th] day of June, 1997.

/s/ D.W. Suttle

D.W. SUTTLE
Senior United States District
Judge